(40)

No. 98-1189-CFX Title: Board of Regents of the University of Wisconsin System, et al., Petitioners
v.
Scott Harold Southworth, et al.

Docketed:
January 28, 1999 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Jan 25 1999	Petition for writ of certiorari filed. (Response due February 27, 1999)
	Feb 25 1999	Brief of respondents Scott Harold Southworth, et al. in opposition filed.
	Mar 1 1999	Brief amici curiae of Lesbian, Gay, Bisexual & Transgender Campus Center, et al. filed.
	Mar 3 1999	DISTRIBUTED. March 19, 1999
	Mar 15 1999	Reply brief of petitioners Bd. of Regents of Univ of WI, et al. filed.
	Mar 22 1999	REDISTRIBUTED. March 26, 1999
	Mar 29 1999	Petition GRANTED. limited to the following question: Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech. SET FOR ARGUMENT November 9, 1999. **********
	Apr 12 1999	Order extending time to file brief of petitioner on the merits until June 14, 1999.
	Jun 8 1999	Blanket consent for all amici wishing to file in this case submitted by counsel for the respondent.
	Jun 9 1999	Brief amici curiae of Pacific Legal Foundation, et al. in support of respondents filed.
	Jun 10 1999	Brief amicus curiae of United Council of University of Wisconsin Students, Inc. filed.
	Jun 11 1999	Joint appendix filed.
	Jun 11 1999	Brief amici curiae of American Council on Education, et al. filed.
	Jun 14 1999	Brief of petitioners Bd. of Regents of the University of Wisconsin System, et al. filed.
	Jun 14 1999	Brief amicus curiae of AFL/CIO filed.
	Jun 14 1999	Brief amici curiae of Americans United for Separation of Church and State, et al. filed.
	Jun 14 1999	Brief amici curiae of United States Student Association, et al. filed.
	Jun 14 1999	Brief amicus curiae of National Education Association filed.
	Jun 14 1999	Brief amici curiae of Wisconsin Student Public Interest Research Group, et al. filed.
	Jun 14 1999	Brief amicus curiae of New York Public Interest Research Group filed.
	Jun 14 1999	Brief amici curiae of Student Press Law Center, et al. filed.
	Jun 14 1999	Brief amici curiae of National Legal Aid Defender Association, et al. filed.
	Jun 14 1999	Brief amici curiae of New York, et al. filed.

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No. 98-1189-CFX

Entry	Date	Proceedings and Orders
	Jun 14 1999	Brief amici curiae of Lesbian, Gay, Bisexual and Transgender Campus Center, et al. filed.
	Jun 14 1999	Brief amicus curiae of Oregon filed.
	Jun 14 1999	Brief amici curiae of American Civil liberties Union, et al. filed.
	Jun 14 1999	Order extending time to file respondent's brief on the merits to and including August 13, 1999.
	Jun 14 1999	Brief amicus curiae of University of California Student Association filed.
	Jun 14 1999	Brief amicus curiae of Brennan Center for Justice at NYU School of Law filed.
	Jun 28 1999	Motion of Student Press Law Center for leave to file a brief as amicus curiae filed.
	Jul 14 1999	Brief amicus curiae of National Smokers alliance filed.
	Aug 11 1999	Brief amicus curiae of Family Research Institute filed.
	Aug 11 1999	Brief amicus curiae of Christian Legal Society filed.
	Aug 11 1999	Brief amicus curiae of American Center for Law and Justice filed.
	Aug 12 1999	Brief amicus curiae of Liberty Counsel filed.
	Aug 12 1999	Brief amicus curiae of Rutherford Institute filed.
	Aug 13 1999	Brief of respondents Scott Harold Southworth, et al. filed.
	Aug 13 1999	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Aug 13 1999	Brief amicus curiae of First Freedoms Foundation filed.
	Aug 13 1999	Brief amici curiae of Owen Brennan Rounds, et al. filed.
	Aug 13 1999	Brief amicus curiae of National Right to Work Legal Defense Foundation, Inc. filed.
	Aug 13 1999	Brief amicus curiae of National Legal Foundation filed.
	Aug 13 1999	Brief amicus curiae of Atlantic Legal Foundation filed.
	Sep 3 1999	Record filed.
	Sep 13 1999	Record filed.
	Sep 13 1999	Reply brief of petitioners Board of Regents of University of Wisconsin System, et al. filed.
	Sep 21 1999	CIRCULATED.
	Oct 4 1999	Motion of Student Press Law Center for leave to file a brief as amicus curiae GRANTED.
	Nov 9 1999	ARGUED.

(1)

Supreme Court, U.S.
FILED

No. ____

981189 JAN 25 1999

In The

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

**Counsel of Record*

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QUESTIONS PRESENTED

(1) Whether the First Amendment is offended by a public university's creation of a non-spatial forum for the expression of diverse student speech, through its viewpoint-neutral distribution of a compulsory student activity fee to pay for costs of expressive activities, such as postage, printing, and honorariums for speakers.

(2) Whether the First Amendment is offended by a public university's funding of organizations that provide services to a significant portion of the student body through the use of a small activity fee paid by all students who choose to matriculate.

LIST OF PARTIES

Actual parties to the proceedings in the Court of Appeals were:

Michael W. Grebe, Sheldon B. Lubar, Jonathan B. Barry, John T. Benson, Brigit E. Brown, John Budzinski, Alfred S. De Simone, Lee S. Dreyfus, Daniel C. Gelatt, Kathleen J. Hempel, Ruth Marcene James, Phyllis M. Krutsch, Virginia R. Macneil, San W. Orr, Jr., Gerald A. Randall, Jr., Jay L. Smith and George K. Steil, Sr., all in their official capacities as members of the Board of Regents of the University of Wisconsin System. Michael W. Grebe, Sheldon B. Lubar, Brigit E. Brown, John Budzinski, Lee S. Dreyfus, Daniel C. Gelatt, Phyllis M. Krutsch and George K. Steil, Sr., are no longer members of the Board of Regents of the University of Wisconsin System; their positions on the Board of Regents have been filled by Patrick G. Boyle, JoAnne Brandes, Bradley D. DeBraska, Guy A. Gottschalk, Toby E. Marcovich, Frederic E. Mohs, Jose A. Olivieri and Grant E. Staszak.

Petitioners herein,

Scott Harold Southworth, Amy Schoepke, Keith Bannach, Rebecka Vander Werf, Rebecca Bretz, Kendra Fry and Jamie Fletcher.

Respondents herein.

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No. ____

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the members of the Board of Regents of the University of Wisconsin System, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 10, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 151 F.3d 717 (7th Cir. 1998) (Pet.-Ap. 13a-51a). The Seventh Circuit's denial of the Petition for Rehearing, and the dissents therefrom, are reported at 157 F.3d 1124 (7th Cir. 1998) (Pet.-Ap. 1a-12a). The opinion of the United States District Court for the Western District of Wisconsin (Pet.-Ap. 78a-99a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 10, 1998. Petitioners filed a Petition for Rehearing With Suggestion of Rehearing En Banc which was denied by Order dated October 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes § 36.09(5) provides:

> The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the immediate governance of

> and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

STATEMENT OF THE CASE

A. Background and Facts.

This case concerns the ability of public universities to fund, using a small portion of the student activity fees paid by all students who choose to matriculate, (1) a non-spatial forum consisting of resources for printing, postage, etc., provided on a viewpoint-neutral basis that enables students to present ideas and hear others on the fullest range of human interests and (2) campus organizations that provide services to a significant portion of the student body. The forum is created by using a small fraction of the fees collected from matriculating students and providing it to the student government, which then distributes those funds to registered student organizations to facilitate their organizational and expressive activities. Student involvement in the distribution of student fees that support campus activities is required pursuant to Wis. Stat. § 36.09(5) (see Stip.¶ 2, Pet.-Ap. 101a). The parties entered into a stipulation about how the process of collection and distribution of funds works and specifically stipulated that the allocations for funding were "viewpoint-neutral" (Stip. ¶ 12, Pet-Ap. 106a). With respect to the funding of student services, the parties stipulated that the services can be provided by registered student organizations, university departments or community based services, that they "provide direct, ongoing services to significant numbers of UW-Madison students" and that they "contribute

significantly to student health, safety or academic success" (Stip. ¶ 13, Pet-Ap. 106a).

On April 2, 1996, three students at the University of Wisconsin-Madison law school commenced an action for declaratory and injunctive relief against the Board of Regents of the University of Wisconsin System. As those students graduated, other students were added as plaintiffs, respondents herein. Respondents challenged the University of Wisconsin's mandatory student activity fee as compelling them to support organizations whose positions they object to, allegedly in violation of their rights of free speech, freedom of association and freedom of religion under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(3) and (4).

The parties entered a stipulation of facts, and both sides moved for summary judgment, with the district court granting respondents' motion on the First Amendment issue and entering judgment declaring the University of Wisconsin's fee system in violation of the First Amendment. Petitioners appealed to the Seventh Circuit Court of Appeals. The first appeal was dismissed for lack of jurisdiction in an unpublished decision, 124 F.3d 205 (7th Cir. 1997), because the district court had only addressed respondents' request for declaratory relief, not their request for injunctive relief (Pet.-Ap. 66a-73a). On remand, the district court issued an injunction that set forth a detailed procedure by which the Board of Regents of the University of Wisconsin System could collect some student fees (Pet.-Ap. 61a-65a). Petitioners appealed a second time, challenging both the district court's declaratory and injunctive rulings. Respondents filed a cross-appeal on the injunction issue. The Court of Appeals modified the district court's injunction, but affirmed its principal holding that the challenged fee system violated the First Amendment. Petitioners are not seeking review of that portion of the Court of Appeals' decision addressing the injunction issue.

As noted above, the parties entered into a Stipulation of Facts before the district court concerning the amount of student activity fees paid by students at the University of Wisconsin-Madison and the procedures for distributing those fees on that

campus, including the names of the organizations that received funding for the 1995-96 school year (see Stip., Pet.-Ap. 100a-112a). The student government (the Associated Students of Madison or ASM) provides funding to registered student organizations applying for events, operations or travel grants. To qualify as a registered student organization, an organization must meet certain criteria, including, that it be (1) a not-for-profit, formalized group; (2) composed mainly of students; (3) controlled and directed by students; (4) related to student life on campus; and (5) that it abide by all nondiscrimination laws and policies (Stip. ¶ 14, Pet.-Ap. 106a-107a). Over 100 registered student groups received such funding in the 1995-96 academic year (Stip. ¶ 25, attachment c), at a cost of $4.28 per student per semester, which included the cost of supporting the student government itself (Stip. ¶ 5, Pet.-Ap. 103a). At least some respondents were members of student organizations receiving this type of funding (Bannach Depo. at 21; Schoepke Depo. at 17). The parties stipulated that "[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion" (Stip. ¶ 12, Pet.-Ap. 106a). Respondents objected to their fees going to twelve of the registered student organizations that received monies through this process.

Both petitioners and respondents regarded the provision of these funds as creating a forum for student speech. *See, e.g.*, Appellees' Br. (No. 97-1001) at 26 ("[t]he students do not dispute that the University has created a public forum of funding for student groups."). As noted earlier, the respondents specifically stipulated that the funding of this forum is "viewpoint-neutral" (Stip. ¶ 12, Pet.-Ap. 106a).

The parties stipulated that the General Student Services Fund (GSSF) "provides a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13, Pet.-Ap. 106a). They also stipulated that "GSSF funds should also contribute significantly to student health, safety or academic success" (Stip. ¶ 13, Pet.-Ap. 106a). Respondents objected to funding for five of the organizations that received GSSF funding, for a total cost of $1.76 in fees per student per semester (1995-96 school year). Respondents also objected to the $.71 of their activity fee that

funded the Wisconsin Student Public Interest Research Group (WISPIRG), whose funding was authorized by direct student referendum. In all, respondent students objected to the funding of 18 organizations.

B. The District Court's Decision.

The district court described the competing interests as the students' "constitutional right not to be compelled to financially subsidize political or ideological activities balanced against the Board of Regents' authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues" (Pet.-Ap. 86a). Without much explanation, the district court found that the educational benefits of some of the student organizations challenged by respondents were only limited and incidental to their primary political or ideological purposes. The district court rejected petitioners' argument that a viewpoint-neutral forum was being funded and went on to apply a confusing mixed analysis with elements of a "strict scrutiny" test and a "germaneness" test (from *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) (concerning compulsory union dues in a closed shop) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) (concerning compulsory bar dues)). The district court concluded that the funding of student organizations whose primary purpose is to advance political or ideological causes is "not germane to the university's function and accordingly not narrowly tailored to avoid the unnecessary infringement of plaintiffs' First Amendment rights." (Pet.-Ap. 99a).

C. The Seventh Circuit's Decision.

Consistent with the parties' agreement that the challenged funding mechanism resulted in the creation of a non-spatial forum, the Seventh Circuit recognized that in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), "[t]he Supreme Court held that the student activity fees created a forum of money and that once established the forum had to be made available on a viewpoint-neutral basis." 151 F.3d at 722 (Pet.-Ap. 22a). It was this aspect of the funding mechanism which the Court of Appeals perceived as offending First Amendment principles: "If the university cannot discriminate in the disbursement of funds, it is

imperative that students not be compelled to fund organizations which engage in political and ideological activities – that is the only way to protect the individual's rights." *Id.* at 730 n.11 (Pet.-Ap. 40a).

In reaching this conclusion, the Court of Appeals looked to *Abood* and *Keller*'s standards of germane organizational speech as the general principles guiding its decision. The actual determination that the challenged fee mechanism violated the First Amendment proceeded from the Court of Appeal's attempt to apply the three-prong test of whether union expenditures violated the objecting employees' First Amendment rights that a majority of Justices had endorsed in *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991) (but whose application had been agreed to only by a plurality). Under *Lehnert*'s three-prong test the expenditure must be (1) "germane to collective-bargaining"; (2) "justified by the government's vital policy interest in labor peace and avoiding 'free riders'"; and (3) "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 151 F.3d at 724, citing, *Lehnert*, 500 U.S. at 519 (Pet.-Ap. 26a). Neither side had argued *Lehnert* as providing the governing standard. The district court had not relied on or even cited the *Lehnert* standard. To petitioners' knowledge, no court has employed the *Lehnert* test to determine the validity of viewpoint-neutral funding of student speech in a university setting.

In assessing the first prong of *Lehnert*, the Court of Appeals focused principally on the educational value of the content of student group expression, failing to recognize that the much greater educational benefit is likely to lie in the experience of participating in a student organization and expressing one's views outside the classroom and, for the students who serve as the potential audience for such speech, in learning to sort through, and at times turn off, the multiplicity of ideas that find expression on a university campus.

In applying the second prong of *Lehnert*, the Court of Appeals ignored petitioners' main justification for mandatory student funding of student group expression, *i.e.*, that the provision of funding to student groups on a viewpoint-neutral basis created a non-spatial forum for speech. Furthermore, the Court of Appeals

failed to distinguish between organizations receiving funding as part of the forum and organizations that were funded because they provide services to significant numbers of UW-Madison students. The Court of Appeals decision treated all the challenged organizations as though they received their funding through the same process for the same purpose.

In discussing *Lehnert*'s third prong, the Court of Appeals indicated that it was precisely because all student groups would be eligible for funding without regard to their points of view, that objecting students needed to be allowed to withhold funding. 151 F.3d at 730 n.11 (Pet.-Ap. 40a). The Court of Appeals failed to distinguish between being forced to support the speech of a particular group and being compelled to provide funding to create a forum for speech by any group.

Upon petition for rehearing with suggestion for rehearing en banc, a majority of the judges in active service voted to deny rehearing, but four voted to grant rehearing en banc. Judge Ilana Diamond Rovner dissented from the denial of rehearing en banc and filed an opinion which was joined by Judges Diane P. Wood and Terence T. Evans. Judge Rovner wrote that "the free expression of a wide range of ideas is central to the educational mission of a university," further noting that respondents conceded that the funding arrangement created a forum. 157 F.3d at 1125 (Pet.-Ap. 3a). Judge Wood also authored a dissent, joined by Judges Rovner and Evans, writing that the First Amendment and Supreme Court precedent did not call for the outcome the panel had reached. Judge Wood explained that forum-creation analysis rather than compelled speech analysis was appropriate, and recognized the validity of compelled subsidy of a neutral forum for speech. Both dissents discussed the broad ramifications for public universities of the Court of Appeals' decision.

REASONS FOR GRANTING THE WRIT

The Court of Appeals itself recognized that the circuits are split on how the analysis of *Abood* and *Keller* apply to the constitutional uses of mandatory student activity fees. 151 F.3d at 723 (Pet.-Ap. 23a). Judges Rovner and Diane P. Wood, in their dissents from the denial of rehearing en banc, state that the panel's

decision conflicts with the holding of the Second Circuit in *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) and *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994). 157 F.3d at 1125 and 1127 (Pet.-Ap. 2a and 7a).

This case is also of great national importance. The case sets before this Court the question of whether the First Amendment is violated when a public university uses a portion of student activity fees paid by students who have chosen to matriculate to fund a forum for the expression of a wide-range of ideas on diverse topics. The issue is framed by the parties' stipulation that the funds distributed as the forum are distributed on a viewpoint-neutral basis. This Court expressly reserved the constitutional question of "whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe" in *Rosenberger*, 515 U.S. at 840. *See also id.* at 851 (O'Connor, J., concurring). The Court of Appeal's decision undermines the traditional role of universities as centers of free speech and the tradition of student-run activities. *See* 157 F.3d at 1127 (Wood, D.P., J., dissenting) (Pet.-Ap. 6a). The resolution of the First Amendment forum question this case presents is important to public universities across the nation as they struggle with determining how to fund student activities, while respecting the rights of students who object to funding views with which they disagree.

The second question, of whether the First Amendment is violated when a public university uses a portion of student fees to fund organizations that provide student services, is framed by the parties' stipulation that these organizations provide services to a significant number of the students on the campus. This case presents an important question that has not been treated separately by the courts. Courts have conflated the two issues, treating student service organizations and/or the services themselves as though their principal purpose was political or ideological advocacy, and subjecting them to the same First Amendment analysis.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS FROM OTHER CIRCUITS.

The Court of Appeals noted that "every other circuit to have considered the constitutional uses of mandatory student activity fees has applied the *Abood [v. Detroit Bd. of Education*, 431 U.S. 209 and *Keller [v. State Bar of California*, 496 U.S. 1] analysis," but recognized that "the circuits are split on how exactly the analysis applies," and cited *Galda v. Rutgers*, 772 F.2d 1060, 1063-64 (3d Cir. 1985); *Carroll v. Blinken*, 957 F.2d at 997; *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. den.*, 506 U.S. 1087 (1993); and *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983). 151 F.3d at 723 (Pet.-Ap. 23a). The dissents from the denial of rehearing en banc noted that the Seventh Circuit's decision conflicts with the holding of at least one other circuit, citing *Carroll v. Blinken*, 957 F.2d 991, and *Carroll v. Blinken*, 42 F.3d 122. 157 F.3d at 1125 (Rovner, J., dissenting) (Pet.-Ap. 2a); see also 157 F.3d at 1127 (Wood, D.P., J. dissenting) (Pet.-Ap. 7a).

In *Carroll v. Blinken*, 957 F.2d at 1001, the Second Circuit concluded that the interests of "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate -- together are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG [New York Public Interest Research Group]." On the appeal after remand, the Second Circuit held student activity fees could be used for "(1) activities that foster a 'marketplace of ideas' on the SUNY Albany campus; (2) activities that provide SUNY Albany students with hands-on educational experiences; and (3) extra-curricular activities for SUNY Albany students, both on and off the Albany campus that fulfill SUNY educational objectives." *Carroll v. Blinken*, 42 F.3d at 128.

Similarly, in *Hays*, 969 F.2d at 123, the Fifth Circuit found that a university's educational goals justified the subsidy of a University-sponsored newspaper:

> [T]he University's educational goals [are] sufficiently weighty to justify the University's subsidy of a student-run newspaper. Such a newspaper allows students to have first-hand journalism experience difficult to obtain otherwise. It also creates a forum for public discussion of University-related issues that can "stimulate uninhibited and vigorous discussion on matters of campus and public concern."

Hays, 969 F.2d at 123 (citation omitted).

In *Kania v. Fordham*, 702 F.2d at 481, the Fourth Circuit concluded that a university's partial funding of a student newspaper through mandatory student fees was constitutional. The Fourth Circuit noted that the newspaper did not show any systematic discrimination against opposing viewpoints and concluded that the funding of the newspaper served "the state's legitimate interest in creating the richest possible educational environment at the University and, in its role as a forum for the expression of differing viewpoints, is a vital instrument of the University's 'marketplace of ideas.'" *Id.* at 477 (citation omitted).

In contrast, the Third Circuit in *Galda v. Rutgers*, 772 F.2d 1060, applied the *Abood* and *Keller* germaneness analysis and concluded that the New Jersey Public Interest Research Group's educational benefits were incidental to the organization's primarily political and ideological purpose. However, even that court recognized the importance of, and distinction when, a forum is created with the funds:

> As *Galda I* emphasized, there is a distinction between PIRG and student organizations that are funded through the student activity fee. We noted that the student activity fee is used to subsidize a variety of student groups, and therefore

> that assessment can be "perceived broadly as providing a 'forum' for a diverse range of opinion."

Galda, 772 F.2d at 1064.

State supreme courts have also split on this important First Amendment issue. *Contrast Smith v. Regents of University of Cal.*, 4 Cal.4th 843, 16 Cal.Rptr.2d 181, 844 P.2d 500, *cert. den.*, 510 U.S. 863 (1993) (public fora cases offer little assistance, no student group claims to be a public forum; when the educational benefits a student group offers become incidental to the group's primary objective of advancing its own political and ideological interests it cannot be funded with compulsory fees); *with Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973) (mandatory fee funding constituted a "monetary platform" for introducing spectrum of ideas into campus, students had not shown that university prevented them from presenting their own viewpoints); *Good v. Associated Students of Univ. of Washington*, 86 Wash.2d 94, 542 P.2d 762 (1975) (mandatory fee funding held constitutional when balanced against university's purpose of posing a broad spectrum of ideas, provided expenditures were within statutory authorization); and *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d 568 (1973) (mandatory fees to fund student newspaper, student government and speaker's program held to be part of educational process; so long as many viewpoints were expressed, there was no constitutional violation).

This significant constitutional question that has split the circuits and that was expressly reserved in *Rosenberger*, 515 U.S. at 840, is ready for this Court's resolution. The secondary question, concerning the application of First Amendment principles to the funding of student services provided by organizations funded through student activity fees merits resolution at the same time, since courts have considered the issues together and funding for both is the common practice.

II. THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS.

The constitutional issues being presented to this Court are whether a small portion of the student activity fee paid by students

at a public university can be used to fund (1) what respondents and the Court of Appeals have recognized is a forum[1] that distributes money to student organizations on a basis that is "viewpoint neutral," as stipulated to by all parties; and (2) organizations that provide services to significant numbers of students, even if the organizations providing services, or the services themselves, may have some advocacy component. The constitutional question concerning funding of a forum of money is one which the Supreme Court explicitly reserved in *Rosenberger*, 515 U.S. at 840:

> The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. See *Keller* (citation omitted); *Abood* (citation omitted).

See also id. at 851 (O'Connor, J., concurring).

In dissenting from the denial of rehearing en banc, Judge Rovner noted the importance of the question of funding of a forum raised in this petition: "This important First Amendment case merits the consideration of the full court. . . . . Its effect is to impede the ability of public universities to fund student groups that represent a wide range of viewpoints. The resulting impact on the expression of ideas on campus would undermine the educational mission of those universities, and is not required by the First Amendment." 157 F. 3d at 1125 (Rovner, J., dissenting) (Pet.-Ap. 2a). In her dissent, Judge Wood wrote: "It would be difficult to overstate the ramifications of the panel's conclusion that the First Amendment prohibits student associations at public universities from distributing a common fund to a particular student group, if one or more students at the university find the recipient's message offensive. I fear this will spell the end, as a practical matter, to the long tradition of student-managed activities on these campuses." *Id.* at 1127 (Wood, D.P., J., dissenting) (Pet.-Ap. 6a).

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[1] *See, e.g.*, Appellees' Br. (No. 97-1001) at 26 ("[t]he students do not dispute that the University has created a public forum of funding for student groups.").

As noted above, both petitioners and respondents had regarded the provision of funding to student groups on a viewpoint-neutral basis as creating a non-spatial forum for speech in their arguments to the Court of Appeals. The Court of Appeals did not disagree, but expressly commented that in *Rosenberger*, "[t]he Supreme Court held that the student activity fees created a forum of money and that once established the forum had to be made available on a viewpoint-neutral basis." 151 F.3d at 722 (Pet.-Ap. 22a). However, the Court of Appeals still failed to apprehend the critical difference between being forced to support the speech of a particular group and being compelled to provide funding to create a forum for speech by any group, a fundamental distinction that is plainly at the heart of much First Amendment jurisprudence. The whole point of a forum and its special First Amendment status is that anyone and everyone can use it no matter how offensive their speech may be to some. *Cf., Nat. Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam). It then is difficult to see how the First Amendment is offended by requiring politically liberal homosexual students and conservative, Christian students alike to bear the costs of creating a forum for the expression of each other's and all other viewpoints at the University of Wisconsin.

Under the forum framework, the state's interest in the challenged funding is the same as it would be if the university used part of the student fees to build a new auditorium where any speaker would be permitted to speak. Both authors of the dissents from the denial of rehearing noted that the Court of Appeals had erred in using a compelled speech analysis rather than a forum creation analysis. 157 F.3d at 1128 (Wood, D.P., J. dissenting) (Pet.-Ap. 10a), 157 F.3d at 1126 (Rovner, J. dissenting) (Pet.-Ap. 4a). The use of compelled speech analysis ignored that both parties had argued that a forum was created with the student activity fees, that the funded student organizations did not speak for the university or even for the student body (151 F.3d at 732, Pet.-Ap. 44a), and that in fact the funded organizations presented conflicting views on issues. Judge Wood noted in her dissent from the denial of rehearing en banc that the Court of Appeal's decision appears to create a serious conflict with the premise that student fees can fund a monetary forum which underlies this Court's decision in *Rosenberger*. 157 F.3d at 1127 (Wood, D.P., J., dissenting) (Pet.-Ap. 7a).

The Court of Appeals purported to apply a three part test from *Lehnert*, 500 U.S. 507 (that five Justices subscribed to generally, but not as applied), even though *Lehnert* was a plurality decision addressing the expenditure of compulsory union dues in furtherance of a labor union's own expressive activities, even though the district court had not relied on or applied *Lehnert*, even though the parties had not discussed applying *Lehnert*, and even though petitioners could not find any other reported decision applying *Lehnert's* three-prong test to the use of mandatory student fees to fund expressive activities on a university campus through a viewpoint-neutral distribution system. *Lehnert's* test was expressly framed in terms of collective bargaining activities and the governmental justification for authorizing agency or union shops. *See Lehnert*, 500 U.S. at 519. There are many differences between the types of discourse that occur at a large, public university and the type of advocacy a labor union is likely to engage in. These differences render problematic any attempt to apply *Lehnert* to a university setting. Judge Wood stated in her dissent: "important and unsettled questions of law exist, insofar as the majority is relying on the views of the plurality of four members of the Supreme Court in *Lehnert* [citation omitted]." 157 F.3d. at 1127 (Wood, D.P., J., dissenting) (Pet.-Ap. 7a). And as Judge Rovner stated:

> I submit that the potential interference with the speech interests of the students in this case are overstated. This section of the opinion relies entirely on a part of *Lehnert* [citation omitted] which received the support of only four justices, and thus is not controlling. Moreover, the panel fails to recognize that the "burden on objecting student's speech" is lessened by the availability of the same funds to present opposing speech. In that way, this case is again fundamentally different from *Abood* and *Keller*. In *Abood*, the union was the sole determinant of the speech. Similarly, in *Keller*, the bar association that received funds controlled the speech. In the present case, however, the activity fees are available to myriad student groups. . . . [T]he dues support multiple viewpoints. Indeed, the objectors could

> presumably form their own student group and receive funds for the expression of a contrary viewpoint, and some belong to a group that already does so. Where the same funds are available for them to express their disagreement, the burden on their speech is minimal.

157 F.3d at 1126-27 (Rovner, J., dissenting) (Pet.-Ap. 6a).

This Court's precedent has long recognized the unique role of universities in providing a wide range of expression, even if that speech is political and ideological. *See* 157 F.3d at 1126 (Rovner, J., dissenting) (Pet.-Ap. 5a) citing *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589, 603 (1967); and *Widmar v. Vincent*, 454 U.S. 263, 278-80 and n.2 (1981). The very mission of the University of Wisconsin system, established by statute, shows the broad role a public university plays in the community. This stands in stark contrast to the narrow roles of unions and bar associations at issue in *Abood*, *Keller* and *Lehnert*:

> The mission of the system is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. Basic to every purpose of the system is the search for truth.

Wis. Stat. § 36.01(2).

The Court of Appeals' decision also painted with too broad a brush when it included all organizations that provide services to students within its decision on political and ideological advocacy, without considering the stipulation that the organizations provide

services to significant numbers of students and without considering the importance of these services, separate from any advocacy.

A decision by this Court on whether a public university can use a portion of the student activity fee paid by students who choose to matriculate to fund a viewpoint-neutral forum and to fund the provision of services to a significant portion of the student body, would resolve the differences of opinion between different circuit courts and within the Seventh Circuit itself, as well as between the highest courts of several states. This Court would give guidance to public universities across the nation concerning how to collect and distribute student activity fees. No further proceedings in the lower courts are needed to clarify the issues presented, and the parties entered a stipulation concerning material facts. These important questions of constitutional law are ready for resolution by this Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

*Counsel of Record

January 1999

No. ____

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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In the
United States Court of Appeals
for the Seventh Circuit

NOS. 97-3510 & 97-3548

SCOTT H. SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, et al.,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 96 C 292—**John C Shabaz**, *Chief Judge.*

On Petition for Rehearing En Banc

SUBMITTED AUGUST 31, 1998—DECIDED
OCTOBER 27, 1998

Before POSNER, *Chief Judge,* and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD and EVANS, *Circuit Judges.*

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendants-appellants and the answer of the plaintiffs-appellees, all of

the judges on the original panel voted to deny rehearing and a majority of the judges in active service voted to deny rehearing en banc. Judges Walter J. Cummings, Ilana Diamond Rovner, Diane P. Wood and Terence T. Evans voted to grant rehearing en banc. Judge Ilana Diamond Rovner dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Diane P. Wood and Judge Terence T. Evans. Judge Diane P. Wood dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Ilana Diamond Rovner and Judge Terence T. Evans.

The petition for rehearing is denied.

ROVNER, *Circuit Judge,* with whom DIANE P. WOOD and EVANS, *Circuit Judges*, join, dissenting from the denial of rehearing *en banc*. This important First Amendment case merits the consideration of the full court. This panel's opinion conflicts with the holding of at least one other circuit, *see Carroll v. Blinken,* 957 F.2d 991 (2d Cir. 1992) and *Carroll v. Blinken,* 42 F.3d 122 (2d Cir. 1994), and, in my view, misapprehends Supreme Court precedent. Its effect is to impede the ability of public universities to fund student groups that represent a wide range of viewpoints. The resulting impact on the expression of ideas on campus would undermine the educational mission of those universities, and is not required by the First Amendment.

The panel opinion extends the prohibition against compelled speech to a new level, beyond what has been recognized by the Supreme Court. As the panel recognizes, the controlling Supreme Court cases are *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller v. State Bar of California,* 496 U.S. 1 (1990). In *Abood* and *Keller,* however, the recipients of the funds were themselves engaging in the challenged speech, either directly or indirectly. For instance, in *Abood,* the union used dues to fund ideological activities and support political candidates,

and in *Keller,* the state bar used dues for lobbying activities. In contrast to those cases, however, the recipient of the funds in this case is not itself engaging in the challenged speech, nor is that speech even attributable to it. The complaining students are paying fees not to the challenged groups, but to the student government which then uses the money to fund its own operations and over 100 student groups, regardless of viewpoint. This distinction is significant, because the gravamen of the students' complaint is that they are being compelled to speak or to fund speech with which they disagree. The only direct "speech" of the student government, if any, is the promotion of the student government and a forum for student activities and views. The speech of the offending groups can hardly be attributed to the student government, which funds groups of radically different views (including the Federalist Society, of which some plaintiffs were members, and the International Socialist Organization). Indeed, the student government constitutionally must determine funding in a content-neutral manner. *See Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995).

This is no semantic difference. Numerous courts have recognized that the free expression of a wide range of ideas is central to the educational mission of a university, teaching students to think for themselves and to separate the "wheat from the chaff." The students concede that the funding arrangement is designed to create a public forum for free expression, a concept not objected to by plaintiffs. Inherent in a content-neutral forum, however, is the notion that the creators of the forum do not espouse the views of all speakers. Because the "speech" of the individual groups cannot be attributed to the student government, it necessarily cannot be attributed to the students paying the fees to the student government. Consider the payment of tuition which might support research or class topics with which a student might disagree. It is difficult to see how a student could successfully challenge funding to the socialist student group

because it advocates socialism, but could not challenge the use of tuition to fund the salary of a professor who publishes articles touting the merits of socialism. Just as the university is not endorsing the views of its professors, so too the student government is not espousing any particular political or ideological speech. Rather, it is supporting a forum for a wide range of expression. Therefore, there is no issue of "compelled speech" here because the funds are not used by the student government to engage in that speech.

This does not mean that the constitutionality of the funding scheme should depend upon whether the funding is direct or indirect, or that one can "launder" the funding by passing it through a neutral conduit. As *Abood* and *Keller* make clear, even indirect funding can raise constitutional problems. That is not, however, what is happening in this case. In *Abood* and *Keller,* the funds were used by the union and bar association to engage in political and ideological speech both directly and indirectly through private groups. The crucial point, however, is that the private groups were funded *because* of their political and ideological positions, and *for the purpose of furthering* those positions. Therefore, the speech presented by those groups was attributable to the union and the bar association. They were engaged in political and ideological speech regardless of whether it emerged from their own groups or paid spokespersons for their views. In stark contrast, the student government has not aligned itself with any political or ideological viewpoint. It does not fund the groups because of their political or ideological speech, and no one even suggests that the speech engaged in by those groups can be attributed to the student government itself. If the student government is not itself "speaking," how can funds given to it constitute compelled speech? The chain of custody of the funds cannot itself be enough to raise a constitutional issue. Otherwise, the student government could not even order supplies from a company that contributes to political candidates, because the student government money used to purchase those supplies would be

used to "fund" political speech. At a minimum, we must look to whether the immediate recipient of the funds (here, the student government) is itself engaged in any objectionable speech. If it is not, the inquiry should end.

Even if we assumed that speech by the secondary recipients of the funds could be attributed to the students, and thus be viewed as compelled speech, it does not follow that there is a constitutional violation. The panel applies a test developed for a different context and not suited to this case. Moreover, in contrast to the Supreme Court and Circuit cases concerning compelled speech, the panel fails to address each challenged expenditure individually, and analyze the proper balancing for each one. Instead, the panel declares that political and ideological speech as a whole is not germane to the educational mission. That holding flies in the face of numerous Supreme Court pronouncements regarding the importance of robust debate and free expression in a university setting. *See e.g. Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Widmar v. Vincent*, 454 U.S. 263, 278-80 & n.2 (1981). Moreover, the panel erroneously focuses on the motives of the individual groups receiving the funding, stating that the International Socialist Organization, for example, is only incidentally concerned with education and is primarily concerned with promotion of its ideological beliefs. That focus reverses the appropriate analysis. Our focus should be on the funding by the student government, and whether the expression of ideology by the student group promotes the educational mission, regardless of whether that was the intent of the group. Moreover, the reliance on *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), is misplaced here, because the fee in that case was targeted specifically for the objectionable group, not for a forum of all groups, and was granted for the purpose of funding the challenged group's objectives. Because there was a direct connection between the student government and the speech, an analysis of the

educational objectives of that particular group was considered appropriate.

Finally, I submit that the potential interference with the speech interests of the students in this case are overstated. This section of the opinion relies entirely on a part of *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991), which received the support of only four justices, and thus is not controlling. Moreover, the panel fails to recognize that the "burden on objecting student's speech" is lessened by the availability of the same funds to present opposing speech. In that way, this case is again fundamentally different from *Abood* and *Keller*. In *Abood*, the union was the sole determinant of the speech. Similarly, in *Keller*, the bar association that received funds controlled the speech. In the present case, however, the activity fees are available to myriad student groups. The recipients of the fees do not have a monopoly on the fees, and therefore the dues support multiple viewpoints. Indeed, the objectors could presumably form their own student group and receive funds for the expression of a contrary viewpoint, and some belong to a group that already does so. Where the same funds are available for them to express their disagreement, the burden on their speech is minimal. For these reasons, I respectfully dissent from the denial of rehearing *en banc*.

DIANE P. WOOD, Circuit Judge, with whom ROVNER and EVANS join, *Circuit Judges*, dissenting from denial of rehearing *en banc*. It would be difficult to overstate the ramifications of the panel's conclusion that the First Amendment prohibits student associations at public universities from distributing a common fund to a particular student group, if one or more students at the university find the recipient's message offensive. I fear this will spell the end, as a practical matter, to the long tradition of student-managed activities on these campuses. If the First Amendment indeed compelled such a result, then we would

have no choice but to enforce it. But in my view, neither the text of the First Amendment nor the relevant Supreme Court precedents call for any such outcome. The unfortunate consequences of an erroneous legal conclusion here are reason enough for the *en banc* court to give this case its full consideration. But there are other reasons as well that underscore the appropriateness of *en banc* review: (1) there is a conflict in the circuits, see *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) and *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994); (2) important and unsettled questions of law exist, insofar as the majority is relying on the views of the plurality of four members of the Supreme Court in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); and (3) ironically, the panel's decision appears to create a serious conflict with the premise underlying the Supreme Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). For the reasons that follow, I therefore respectfully dissent from the *en banc* court's decision not to rehear this case.

Among the required payments that students registered at the University of Wisconsin must tender, in addition to their tuition payment, is a student activity fee. The University turns a portion of the monies collected over to the Associated Students of Madison (the ASM, or student government), which in turn creates its own budget and allocates surplus funds to various student groups, University departments, community-based service organizations, and registered student organizations. Some of the recipients engage in activities with a political or ideological dimension. In the panel's view, the University's decision to require students to support the ASM and its allocation decisions is tantamount to requiring every individual student to subsidize the speech of every group funded by the ASM. This logical step allows the panel to equate the funding of the ASM to the compelled subsidization of speech addressed in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lehnert*, *supra*. Based on

this equation, the panel concludes that the mandatory student activity fee violates the First Amendment rights of any students who disagree with the message of any of the funded groups. Finally, the court constructs a remedy that would allow dissenters to opt out of that portion of the fee ultimately earmarked for the objectionable group.

I take issue with the panel's fundamental premise—that the fee is a compelled subsidy of speech itself, rather than a compelled subsidy of a *neutral forum* for speech. In my view, there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum. The Supreme Court's decision in *Rosenberger* provides strong support for the characterization of the student activity fee as a forum for speech, which can then be used "to encourage a diversity of views from private speakers." 515 U.S. 819, 830, 834 (1995). Access to that forum, *Rosenberger* makes clear, must be handled on a nondiscriminatory basis: atheist students cannot deny access to the Christian fundamentalists; abortion rights advocates cannot deny access to an organization dedicated to pro-life principles; and Republicans cannot deny access to Democrats.

The panel takes the position that there is no meaningful distinction between a forum for speech and the speakers who use that forum. Again, I respectfully disagree. Different principles control the analysis of compelled funding of a neutral forum than compelled funding of a particular group or speaker. See *Rosenberger*, 515 U.S. at 834. It is commonplace to require the funding of a neutral forum: the taxpayers of the United States support the Mall in Washington, which is used by countless speakers with a virtually infinite range of viewpoints. Even though the government is not entitled to require a citizen to fund the Catholic Church, it is entitled to permit the Pope to conduct a mass on the Mall. See *O'Hair v. Andrus*, 613 F.2d 931, 934

(D.C. Cir. 1979). At some level of generality, this means that non-Catholic citizens have been forced to "subsidize" the religious message that the Pope delivers, but the link is too remote to offend the First Amendment. Indeed, the First Amendment pushes in the other direction, for if the government had to censor the speech of users of the Mall to ensure that it was not offensive to anyone in the country, all it could do would be to close the forum.

Closer to the facts of this case, the University of Wisconsin obviously compels its students to make other payments as well, notably tuition. Just as is the case with the activity fee, students at the University of Wisconsin cannot graduate or receive their grades if they fail to pay their tuition. But what happens to the funds generated by tuition? The University uses them for its operations, and the lion's share of the budget in most universities goes to faculty salaries and research support. Some students undoubtedly find the viewpoints of some faculty members, expressed either in the classroom or in scholarship, to be offensive. Suppose, for example, there is a doctor in the medical school researching more effective ways to use fetal tissue for organ transplants. It is easy enough to imagine a student finding this antithetical to her religious or moral views. Or suppose the University disburses tuition funds to a sociologist who is exploring the hypothesis that children suffer long-term harm if their mothers work while the child is still under the age of 10. A different student may find that equally offensive. (One might say that a student knows *ex ante* that a university has tenured a faculty member with views offensive to that student, and she implicitly agrees to have part of her tuition allocated to that professor when she decides to attend the university. But by the same token the student knows that there is a student association, and she knows something about the demographics of the student body. More than that, unlike a tenured faculty, the membership of a student association changes quickly, and the student has a voice in its composition. More importantly, however, *ex ante* knowledge

cannot cure what would otherwise be a First Amendment violation. No one would say that a worker who objected to a union's activities under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), had lesser rights just because the worker knew when she joined the company what the union was doing. The analogy between the offensive professor and the offensive student group is therefore a close one.) The First Amendment surely does not mandate that researchers be funded on a consenting-student-by-consenting-student basis on the theory that tuition is a compelled subsidy of these researchers' speech. Just as the University as an institution is not espousing the viewpoints of any individual faculty members, the ASM is also not espousing the viewpoints of any of the organizations it funds. Here, both the ASM and the University are doing nothing more than creating the forum for the expression of other people's views. It is the same as if they simply built a large auditorium and held it open for everyone.

The fact that a forum-creation analysis rather than a compelled speech analysis is appropriate here means that *Abood, supra*, and *Keller, supra*, provide only limited help in resolving this case. Important distinctions exist between the relationship between dissenters and speakers there, and the relationship here. Neither the union nor the bar association in those cases created a viewpoint-neutral forum, as the ASM does (and must in the wake of *Rosenberger).* In *Abood* and *Keller,* the organizations at issue were pursuing their own political agendas, and they funded recipient organizations' speech on the basis of viewpoint. The *Abood* and *Keller* plaintiffs' objection to being forced to contribute despite their opposing beliefs was, in essence, an objection to compelled political speech. Here, in contrast, the objecting students are required to fund the ASM, which in turn funds a vast array of recipient organizations regardless of viewpoint-indeed, often with conflicting viewpoints. There is a crucial difference between a requirement to pay money to an organization that explicitly aims to subsidize one viewpoint to the exclusion of

other viewpoints, as in *Abood* and *Keller,* and a requirement to pay a fee to a group that creates a viewpoint-neutral forum, as is true of the student activity fee here. The former is subject to additional First Amendment constraints and must therefore allow dissenters to opt out of the fund; the latter satisfies the First Amendment's concerns with the plurality of views inherent in its viewpoint-neutrality.

Nothing in *Lehnert, supra, is* to the contrary. The issue presented in that case concerned "the constitutional limitations, if any, upon the payment, required as a condition of employment, of dues by a nonmember to a union in the public sector." 500 U.S. at 511. The Court found that *Abood* applied, and it analyzed various particular expenditures that the nonmembers either could or could not be required to support. But these were all direct payments to the organization engaging in the "speech"; nothing like a viewpoint-neutral forum was involved. I do not find *Lehnert* the compelling precedent for this case that the panel did, even apart from the fact that the panel concedes it is relying on one of the parts of the opinion that commanded only a plurality of the Court.

The panel may think it a matter of little moment if the University cannot collect, even temporarily, the few dollars from dissenting students that had been destined for the organizations to which they object. I am not so sanguine. Indeed, I fear that the rule announced in this case, in combination with *Rosenberger,* will logically result in excluding everyone. Just as these plaintiffs have a "hit list" of organizations to which they object, other students will have their own lists. At a large and diverse university like the University of Wisconsin at Madison, some students will almost certainly object just as strongly to a Christian Coalition, or to the Federalist Society, or to the Pro-Life Action League as these plaintiffs do to WISPIRG, the Campus Women's Center, the Lesbian, Gay, Bisexual Campus Center, and the rest. *Some* students will object on

ideological grounds to virtually every organization funded by the ASM. The transaction costs attendant to soliciting and processing the individual preferences of each of the 40,196 students at this university, to reduce the semester fee from $165.75 to some lower number, would be prohibitive. In the end, grafting dissenters' rights onto a neutral forum for the expression of a full panoply of viewpoints will most likely eliminate the forum altogether, which is a perverse way indeed to safeguard the kind of free and open political and intellectual debate that lies at the heart of the First Amendment, and that is especially important in a university setting, see, *e.g., Carroll v. Blinken,* 957 F.2d 991, 999-1001 (2d Cir. 1992). This surely turns *Rosenberger* on its head, transforming it into the instrument that undoes the very "tradition of thought and experiment" the Court so vigorously sought to protect. 515 U.S. at 835. Further, eliminating the forum would also deprive the students of the opportunity to serve their community and develop the kind of skills required to run a student association, a student union, or a like group.

In sum, I believe the panel erroneously analyzed the mandatory student activity fee at the University of Wisconsin as the compelled subsidy of specific instances of speech rather than as the compelled creation of a neutral forum for speech. This error has serious and harmful consequences, at odds with the First Amendment rather than compelled by it, which will be felt at all public universities in this circuit. It will needlessly reduce the quality of education and experience these institutions can offer matriculating students. I therefore respectfully dissent from the court's decision not to rehear the case *en banc.*

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

In the
United States Court of Appeals
for the Seventh Circuit

NOS. 97-3510 & 97-3548

SCOTT H. SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, et al.,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 96 C 292—**John C Shabaz**, *Chief Judge.*

On Petition for Rehearing En Banc

SUBMITTED FEBRUARY 26, 1998*—DECIDED AUGUST 10, 1998

Before BAUER, HARLINGTON WOOD, JR. and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Students attending the University of Wisconsin-Madison must pay a student activity fee. A portion of this mandatory fee is distributed to private organizations which engage in political and ideological activities. Plaintiffs, students at the University of Wisconsin-Madison, sued the Regents of the University claiming that forcing objecting students to fund such organizations violates their First Amendment rights, as well as other federal and state statutes. After various procedural motions and argument, the district court granted plaintiffs summary judgment on their freedom of speech and association claims, dismissed the remaining claims, and entered an injunction which both barred such funding and established a detailed opt-out mechanism. We affirm the district court's determination that forcing objecting students to fund private organizations which engage in political and ideological activities violates the First Amendment, but reverse and vacate portions of the declaratory judgment and injunction.

* This is a successive appeal to No. 97-1001, which was argued on June 14, 1997, and which we dismissed for lack of jurisdiction. *Southworth v. Grebe*, 124 F.3d 205 (7th Cir. 1997) (unpublished order).

I. BACKGROUND.

A. Procedural and Factual Background

Plaintiffs Scott Southworth, Amy Schoepke, Keith Bannach, Rebecca Bretz, and Rebecka Vander Werf each attended or still attend the University of Wisconsin-Madison. They sued the members of the Board of Regents of the University of Wisconsin System ("the Regents"), claiming that the Regents' use of objecting students' mandatory student activity fees to fund private organizations that engage in political and ideological advocacy, activities, and speech violates their rights of free speech and association, the Free Exercise clause of the Constitution, the Religious Freedom Restoration Act, ("RFRA")[1], and various state laws. They sought both injunctive and declaratory relief.

[1] The Supreme Court declared the RFRA unconstitutional in *City of Boerne v. P.F. Flores, Archiboshop of San Antonio*, 117 S.Ct. 2157 (1997).

The district court granted plaintiffs summary judgment on their free speech and free association claims, and the Regents appealed. We dismissed the original appeal as impermissibly interlocutory, and remanded to the district court. *Southworth v. Grebe,* 124 F.3d 205 (7th Cir. 1997) (unpublished order). Following various interim procedural refinement—none of which merit discussion here the district court dismissed the remaining claims and granted the plaintiffs injunctive relief. This successive appeal followed. Because extensive briefing and argument on the merits of this case have already occurred, we instructed the parties to limit their additional briefing to the district court's decision on remand. We have reviewed these new briefs and the record, and conclude that additional oral argument on those issues is unnecessary, Fed. R. App. P. 34(a), Cir. R. 34(f). We now proceed to the merits, which include only the plaintiffs' First Amendment challenge to the Regents' mandatory student activity fee policy.

B. **Mandatory Student Fee Policy**

Students enrolled full-time at the University of Wisconsin-Madison must pay a mandatory student activity fee; it's mandatory because students who refuse to pay can not receive their grades or graduate. During the 1995-96 academic year (the academic year during which the plaintiffs filed suit) the Regents assessed a mandatory student fee of $165.75 each semester.

Section 36.09 of the Wisconsin Code gives both the Regents and the students control over the funds generated by the mandatory student fee. The extent of control depends on the classification given the student fees: The Regents classify a portion of the student fees as nonallocable and a portion as allocable. Although the students (through student government representatives) review and make recommendations regarding the use of nonallocable fees, the

Regents control the distribution of these fees. (The nonallocable fees cover expenses such as debt service, fixed operating costs of auxiliary operations, student health services, and the first and second year of the Recreational Sports budget.) On the other hand, the Associated Students of Madison ("ASM") (the official representative of the student body) has complete authority over most of the allocable funding. Because the plaintiffs challenge only the funding from the allocable portion of student fees, we focus on those expenditures.

The distribution network for allocable student fees is rather complicated. We will attempt to draw the money trail to help explain the source of the complaint. As just noted, the ASM has authority over the allocable portion of student fees. Among other things, these fees fund the General Student Service Fund ("GSSF") and the Associated Students of Madison budget. In turn, both the GSSF and the ASM distribute the mandatory student fees to other private organizations, although the distribution process differs. The GSSF is distributed to private organizations by a committee of the ASM called the Student Services Finance Committee ("SSFC").[2] Registered student organizations, University departments, and community-based service organizations qualify for funding from the GSSF. To obtain money from the GSSF, the organization must apply to the SSFC. After reviewing the application, the SSFC determines whether to grant or deny the request for money, and if granted the SSFC also determines the amount of funding the private organization will receive. During the 1995-96 school year, the SSFC distributed about $74,200 in student fees to private organizations.

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[2] Because of the need to abbreviate the various student groups by letters/acronyms, we insert for convenient reference: ASM - Associated Students of Madison; GSSF - General Student Service Fund; SSFC - Student Services Finance Committee.

The ASM budget also funds private organizations, although only "Registered Student Organizations" qualify for funding from the ASM budget. To qualify as a Registered Student Organization, among other things, a group must be a formalized not-for-profit group, composed mainly, but not necessarily exclusively, of students, and controlled and directed by students. A Registered Student Organization may obtain money from the ASM budget in the form of a grant to support its operations, related travel, or to sponsor an event. During the 1995-96 school year, the ASM budget distributed $109,277 in student fees to private organizations.

In addition to obtaining money from the GSSF and the ASM budget, a Registered Student Organization may seek funding through a student referendum. With a student referendum, students vote at large on whether or not to approve an assessment for the student group. The Wisconsin Student Public Interest Research Group ("WISPIRG") obtained $49,500 in student fees during the 1995-96 academic year as the result of a student referendum.

After the ASM and the SSFC (or the students by referendum) have made their funding decisions, these decisions are sent to the Chancellor and the Board of Regents for their review and approval; while the ASM has complete authority over most of the allocable funding, the Regents have final authority to approve or disapprove the allocations of funds by the student government under section 36.09(5) of the Wisconsin Code.

C. Organizations Funded by the Student Fees

The GSSF, the ASM budget, and student referendums can fund many different activities and organizations. However, the plaintiffs object only to the funding of organizations which engage in political and ideological activities with fees collected from students who object to

such funding. (Henceforth we shall refer to them as "objecting students.") Plaintiffs presented evidence of eighteen organizations which both receive student fees and engage in political and ideological activities: WISPIRG; the Lesbian, Gay, Bisexual Campus Center; the Campus Women's Center; the UW Greens; the Madison AIDS Support Network; the International Socialist Organization; the Ten Percent Society; the Progressive Student Network; Amnesty International; United States Student Association; Community Action on Latin America; La Colectiva Cultural de Aztlan; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Students of National Organization for Women; MADPAC; and Madison Treaty Rights Support Group.

Reviewing the evidence in the light most favorable to the Regents, as we must, we conclude that the 18 organizations listed above both receive student fees and engage in political and ideological activities. While the record is replete with examples, we limit ourselves to a sample:

WISPIRG, which received $49,500 in student fees during the 1995-96 school year, distributed $2,500 directly to its parent organization U.S. PIRG for use in lobbying Congress and developing candidate-voter guides. WISPIRG also published a voters' guide, which ranked congressional candidates based on their views on various pieces of federal legislation. During 1995-96, the UW Greens received $6,905 in student fees. The UW Greens, along with the Progressive Student Network (another group funded with student fees), lobbied the Wisconsin state legislature, and encouraged legislators to introduce three bills which would limit mining in the state. The UW Greens also distributed literature for the Green Party USA, a political party, and distributed campaign literature for Ralph Nader during his bid for U.S. President on the Green Party ticket. Along with WISPIRG and other groups, the UW Greens also organized a march on

the state capital to show their opposition to the governor and the governor's budget.

Another recipient of mandatory student fees, the International Socialist Organization, advocated the overthrow of the government: "Revolution Not Reform. Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown. The structures of their present government—parliaments, the army, the police and capitalism—cannot be taken over and used by the working class." Along with the UW Greens and other groups, the International Socialist Organization sponsored a rally at the state capitol and at a congressman's office. The International Socialist Organization also joined with about 400 others to demonstrate outside a church located in Madison to oppose the ideological views of a church speaker.

The Campus Women's Center, which received $34,200 in student fees, used its bimonthly newsletter to advocate its political and ideological views. For instance, in the February/March 1996 issue of "The Source," the newsletter published a lengthy article opposing the Informed Consent Bill (Assembly Bill 441), which proposed certain regulations of abortion. This article urged people to contact the Campus Women's Center to learn how they could work against this legislation:

> We must act now to block this bill. You can obtain a copy of the bill at the Legislative Reference Bureau. Familiarize yourself with its contents and get prepared to defend women's rights to reproductive choice when the bill hits the Senate Floor in March. For more information or to find how you can become further involved, contact Jennifer at the Campus Women's Center: 262-8093.

Other examples include the Ten Percent Society which in its funding application stated that it has "also been active in

the political arena as necessary." The Ten Percent Society received funding and used its Internet Home Page to advocate legislation authorizing same-sex marriages, while condemning attempts by the Wisconsin Legislature to ban them. The Progressive Student Network and Amnesty International also received student fees: The Progressive Student Network focused on a variety of issues including "free trade (NAFTA/GATT), welfare reform, . . . right-wing backlash on campus, the GOP's 'contract with America,' etc. . . ." And Amnesty International worked publicly for the abolition of the death penalty.

The defendants do not dispute that these and other organizations engage in political and ideological speech. Instead, the Regents argue that the First Amendment protects the rights of these organizations to engage in such speech. Of course it does. But the students do not ask that we restrict the speech of any student organization; they merely ask that they not be forced to financially subsidize speech with which they disagree. In other words, Amnesty International is free to oppose the death penalty and can continue to advocate its position; the Women's Resource Center can still speak out against informed consent legislation; and the UW Greens, the International Socialist Organization and WISPIRG can lobby all they want. The Regents and amici rely on the First Amendment's guarantee of free speech as support for their position, but the First Amendment does not guarantee that the government will subsidize speech. *See, Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 n.9 (1986) ("[T]here is no right to have speech subsidized by the Government."). In short there is absolutely no question here of restricting the speech of any private organization. *See, e.g., Smith v. Regents of the University of California*, 844 P.2d 500, 503 (Cal. 1993) ("In fact, the case has nothing to do with restrictions on speech. It goes without saying that all students are free to organize, to promote their ideas, and to seek by all legal means to persuade others that their views are correct. . . .").

Other aspects of the mandatory student fee which the students do not challenge include: the Regents' authority to collect student activity fees; the Regents' use of the nonallocable portion of the student activity fee; the Regents' use of the allocable portion of the student activity fee to fund the student government; the Regents' use of the allocable portion of the student activity fee to fund private organizations which do not engage in political or ideological speech, activities, or advocacy; the Regents' use of the allocable portion of *non-objecting* students' activity fees to fund private organizations engaging in political or ideological speech, activities, or advocacy; or the Regents' use of the allocable portion of the student activity fee to fund the student newspaper, or the Distinguished Lecture Series.

This leaves a very limited constitutional question: whether the Regents can force objecting students to fund private organizations which engage in political and ideological activities, speech, and advocacy. The district court concluded that they could not, and granted the plaintiffs declaratory and injunctive relief. We begin by considering the declaratory relief.

II. ANALYSIS

A. Declaratory Judgment

The district court entered a declaratory judgment that "the defendants' use of the mandatory segregated fees to support political and ideological activities violates the First Amendment to the United States Constitution, . . ." The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Supreme Court has long recognized two necessary corollaries to the First Amendment's guarantee of free speech: the right not to speak, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); and the right not to be compelled to subsidize others' speech, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). It is based on these familiar corollaries, and specifically *Abood* and *Keller*, that the plaintiffs challenge Wisconsin's mandatory student fee policy.

The Supreme Court has yet to determine whether these First Amendment corollaries protect objecting students from being forced by state universities to subsidize private political and ideological organizations. However, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Supreme Court provided guidance on the appropriate analysis for such a challenge. In *Rosenberger*, students who published a Christian newspaper at the University of Virginia challenged the university's denial of their request for funding from the university's mandatory student activity fees. Although the university had used student fees to pay for printing costs for non-religious newspapers, the university denied the plaintiffs' request because of the newspaper's religious viewpoint. *Id.* at 825-27. The Supreme Court held that the student activity fees created a fora of money and that once established the fora had to be made available on a viewpoint-neutral basis. Because the University of Virginia discriminated based on the religious viewpoint of the newspaper, it had violated the First Amendment.

While *Rosenberger* did not consider the question we have before us, in noting what was not before it, the Court directed us to the *Abood* and *Keller* analysis:

> The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller v. State Bar of California*, 496 U.S. 1, 15-16 (1990); *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235-236 (1977).

Id. at 840. See also, Rosenberger, 515 U.S. at 851 (O'Connor, concurring) ("Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1, 15 (1990); *Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1977).").[3]

Not only does *Rosenberger* direct us to *Abood* and *Keller*, but every other circuit to have considered the constitutional uses of mandatory student activity fees has applied the *Abood* and *Keller* analysis (although the circuits are split on how exactly the analysis applies). *Galda v. Rutgers*, 772 F.2d 1060, 1063-64 (3d Cir. 1985); *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983). *See also, Smith v. Regents of the University of California*, 844 P.2d 500, 511 (Cal. 1993) (applying the *Abood* and *Keller* analysis). Given the Supreme Court's lead and the overwhelming authority from other circuits, the issue before us is properly reviewed under the authority of *Abood* and *Keller*.

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[3] The Regents try to shoehorn this case into *Rosenberger*. However, as the Court made abundantly clear, it considered only the disbursement of student activity fees; it did not consider the constitutionality of forcing students to fund private political and ideological organizations. *Rosenberger*, 515 U.S. at 840.

In *Abood*, 431 U.S. 209, employees of the Detroit Board of Education challenged the constitutionality of an agency-shop agreement which required teachers who did not join the union to pay a service fee to the union. The teachers argued that this mandatory fee violated their First Amendment rights to free speech and free association. The Supreme Court held that the Board of Education could compel non-union teachers to pay the service fee, explaining that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222. Thus, so "long as [the union 3] act[s] to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223.

The Court continued, clarifying its holding:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes *not germane to* its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36 (emphasis added).

Thirteen years later in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Supreme Court revisited the issue of compelled funding. In *Keller*, a group of lawyers challenged the use of mandatory state bar dues to fund lobbying on social issues. The Supreme Court began by explaining *Abood*:

> *Abood* held that unions could not expend a dissenting individual's dues for ideological activities not *germane* to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 13-14.

From *Keller's* holding ("The State Bar may therefore constitutionally fund activities *germane to* those goals. . . .", 496 U.S. at 13) and *Abood's* qualification (the Constitution requires that expenditures for ideological cause *not germane* be financed by voluntary funds, 431 U.S. at 235), courts have named the analysis born of *Abood* the "germaneness analysis."[4] Yet *Abood* did not provide much guidance as to its actual application. *Keller* did more by setting forth guidelines for determining permissive expenditures: "[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop v. Donohue,* 367 U.S. 820, 843 (1961) (plurality opinion)). But *Keller* still left many lines to be drawn.

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[4] Actually, the concept of "germaneness" derived from *Railway Employees v. Hanson,* 351 U.S. 225, 235 (1956), wherein the Supreme Court held that only expenditures "germane to collective bargaining" were chargeable to dissenting employees under the Railway Labor Act (as opposed to the First Amendment).

Beyond *Abood* and *Keller,* the Supreme Court has addressed the issue of germaneness in several other cases. *Chicago Teachers Union v. Hudson,* 475 U.S. 292 (1986); *Ellis v. Brotherhood Railway Clerks,* 466 U.S. 435 (1984); *International Ass'n of Machinists v. Street,* 367 U.S. 740 (1961). The most significant development came in *Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507 (1991). In *Lehnert,* the Supreme Court considered the constitutionality of various union expenditures under the germaneness analysis originating in *Abood* and *Keller.* However, in doing so, *Lehnert* explained that this required a three-prong analysis for determining whether union expenditures violated the objecting employees' First Amendment rights: To be constitutional, the expenditure must be "germane to collective bargaining; justified by the government's vital policy interest in labor peace and avoiding 'free-riders'; and not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519. The Supreme Court recently reaffirmed this test. *Air Line Pilots Assoc. v. Miller,* 118 S.Ct. 1761 (1998).

Lenhert's three-prong analysis is the test today. And as *Lenhert* holds, there is more to the germaneness analysis than whether the activity is germane to the governmental interest, but because "germaneness" is the first prong, we begin there.

1. ***Germaneness.***

Under *Lehnert,* the first prong considers whether the mandatory fee is germane to some otherwise legitimate government scheme, in that case collective bargaining. This prong really presents two questions: initially whether there is some otherwise legitimate governmental interest justifying any compelled funding; and then whether the specifically challenged expenditure is germane to that interest. We need not answer the initial question because the students do not contend that the Regents lack a legitimate interest in the

compelled funding of the student government or student organizations.

That leaves the second question: whether the challenged activity is germane to the government's asserted interest. Here the Regents assert an interest in education. They then contend that funding private organizations which engage in political and ideological activities is germane to education because the funding allows for more diverse expression and this in turn is educational. *See reply brief* at 2 ("[E]xpression of diverse viewpoints is germane to the educational mission of the UW-Madison.").

However, "germaneness" cannot be read so broadly as to justify the compelled funding of private organizations which engage in political and ideological advocacy, activities and speech. For example, in *Keller,* the State Bar defended its funding of lobbying on nuclear weapons, abortion, and prayer in public schools arguing that it was authorized to fund activities "in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." 496 U.S. at 15. The Supreme Court rejected such an over-encompassing reading of germaneness, holding instead that expenditures "to endorse or advance a gun control or nuclear weapons freeze initiative," clearly fell at "the extreme end[ ] of the spectrum" of expenditures not germane and therefore unconstitutional. *Id.* at 15-16.

In *Lehnert* the Supreme Court again rejected a broad interpretation of "germaneness." *Lehnert* involved a challenge to the union's use of dues to fund lobbying related to financial support of the employee's profession or public employees generally. The Court held that "[w]here, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection

to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees."[5] 500 U.S. at 520 (plurality). The Court further concluded "that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Id.* at 522 (plurality).

In these cases, the Supreme Court rejected arguments that political and ideological speech is germane to the governmental interest involved. In fact, in *Lehnert,* the Supreme Court stated that germaneness cannot be read so broadly in the context of a private sector union as to *"include political or ideological activities." Id.* at 516 (emphasis added). *See also, Ellis,* 466 U.S. at 452 (holding that while union activities in question may benefit collective bargaining, the benefits were too attenuated to be germane).

Similarly, here germaneness cannot be read so broadly as to include forced funding of private political and ideological groups. The private groups are voluntary and may be open to both students and non-students alike. Many of the groups mirror organizations which exist outside of the University setting (for example, WISPIRG, the UW Greens, the International Socialist Organization, and Amnesty International all have non-university counterparts). And

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[5] In *Lehnert,* five justices adopted the three-prong analysis set forth above, although only four of those five justices agreed on the application of the factors; four justices believed that the challenged lobbying was not germane to collective bargaining, while one justice thought that it was. That is nonetheless the Court's holding. *Marks v. United States,* 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'. . . .") (internal citation omitted). The remaining four justices also concluded that the lobbying activities could not be financed, but applied a "statutory duties test" instead of the three-prong analysis. *Lehnert,* 500 U.S. at 558 (Scalia, concurring in part, dissenting in part).

most of the private student groups (over 70%) do not even apply for funding, showing that the funding is not even germane to the private organizations' existence, much less germane to education. Moreover, unlike, for example, a political science class on socialism, the International Socialist Organization is only incidentally concerned with education. Its primary goal is the promotion of its ideological beliefs. The fact that some educational benefit may come from it is secondary, and therefore not sufficiently germane to overcome the objecting students' constitutional rights. The mere incantation of the rubric "education" cannot overcome a tactic, repugnant to the Constitution, of requiring objecting students to fund private political and ideological organizations.

To justify compelling objecting students to fund the private organizations, the Regents point to the expansive governmental interest they have—education—as compared to the limited interests involved in *Abood* and *Keller*—collective bargaining and oversight of the bar—and argue that because the interest is so broad, more activities are germane, including political and ideological activities. The Regents correctly recognize the breadth of "educational"; everything is in a sense educational (organizing a student activity, engaging in political and ideological speech, even choosing which political party or candidate to fund) even if it merely teaches you that you do not want to do it again. Yet when presented with a similarly expansive interest in *Keller*—the advancement of the law—the Supreme Court rejected such a broad reading of germaneness. *Keller,* 496 U.S. at 15-16 ("[T]o endorse or advance a gun control or nuclear weapons freeze initiative," clearly fell at "the extreme end[ ] of the spectrum" of expenditures not germane and therefore unconstitutional.). We therefore reject the Regents' argument.

The Regents also rely on *Carroll v. Blinken,* 957 F.2d 991 (2d Cir. 1992) *("Carroll I"),* and *Carroll v. Blinken,* 42

F.3d 122 (2d Cir. 1994) *("Carroll II"),* wherein the Second Circuit applied the "germaneness" analysis of *Abood* and *Keller* and held that a state university could constitutionally fund the New York Public Interest Research Group with students' activity fees even though some students disagreed with that speech "as long as that organization spends the equivalent of the students' contribution on campus and thus serves the university's substantial interests in collecting the fee."[6] 957 F.2d at 992. The plaintiffs respond by citing the contrary precedent of *Galda v. Rutgers,* 772 F.2d 1060 (3d Cir. 1985), wherein the Third Circuit applied the *Abood* and *Keller* "germaneness" analysis, and concluded that while the New Jersey Public Interest Research Group offered some educational benefits to students, such benefits were incidental to the organization's primary political and ideological purpose, and this incidental educational benefit did not justify the infringement of the dissenting students' speech and association rights:

> Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the educational benefits are only "incidental"—arising from or accompanying the principal objectives—and

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[6] *Carroll I* required that NYPIRG "spend[ ] the equivalent of the students' contribution on campus," 957 F.2d at 1002, while *Carroll II* refined the holding to require that NYPIRG spend the equivalent on "activities that foster a 'marketplace of ideas' on the [State University of New York] campus; (2) activities that provide SUNY Albany students with hands-on educational experiences; and (3) extra-curricular activities for SUNY Albany students, both on and off the Albany campus, that fulfill SUNY educational objectives." 42 F.3d at 128.

> subordinate to the groups' function of promoting its political and ideological aims.

Galda, 772 F.2d at 1065.

The students also rely on the California Supreme Court decision in *Smith v. Regents of the University of California,* 844 P.2d 500, *cert. den.,* 510 U.S. 863 (1993), which followed *Galda* and rejected *Carroll.* In *Smith,* students at the University of California at Berkeley challenged the school's mandatory activity fee which financed the student government and other student activity groups. The students claimed that using their fees to subsidize private organizations which engaged in political or ideological activities violated the First Amendment. The California Supreme Court held that:

> The principles that we derive from *Carroll* and *Galda,* as well as *Keller* and *Abood,* are these: A university may, in general, support student groups through mandatory contributions because that use of funds can be germane to the university's educational mission. At some point, however, the educational benefits that a group offers become incidental to the group's primary function of advancing its own political and ideological interests. To fund such a group may still provide some educational benefits, but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights. Phrased in terms of the tests that courts have applied, a regulation that permits the mandatory funding of such groups is not "narrowly drawn to avoid unnecessary intrusion on freedom of expression" and it "unnecessarily restrict[s] constitutionally protected liberty, [when] there is

> open a less drastic way of satisfying its legitimate interest."

Id. at 511 (internal citations omitted).

Were we to have to decide based solely on *Carroll, Galda,* and Smith, we would find *Galda* and Smith's analyses and conclusions more persuasive, and we would conclude that funding of political and ideological speech of private organizations is not germane to the university's mission.[7] But our decision is not confined to lower court analyses. Rather, we have the Supreme Court's guidance on interpreting "germaneness," and the Court's example, *see supra* 14-17, counsels against adopting the broad reading of "germaneness" which *Carroll* took. However, even if germaneness could be read as broadly as the Regents suggest and the Second Circuit allowed, and we (along with the Third Circuit and the California Supreme Court) are wrong in our assessment of the germaneness of a University's funding of private political and ideological groups to education, the Regents would be less than halfway home. As *Lehnert* made clear, "germaneness" is not the be-all/end-all question in the constitutional analysis, but rather is only the first prong: Under *Lehnert,* not only must the mandatory fee be germane to some otherwise legitimate economic or regulatory scheme, the compelled funding must also be justified by vital interests of the government, and not add significantly to the burdening of free speech inherent in achieving those interests. Yet *Carroll* did not consider these additional requirements, and in a case such as this involving the forced funding of political

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[7] *Galda* (and *Carroll* for that matter) involved limited challenges to compelled funding of PIRG, and did not address the specific question presented here. 772 F.2d at 1064. Nonetheless, we believe the same analysis should govern private student organizations.

and ideological speech, those factors obtain the utmost significance.[8]

2. ***Vital policy interests of the government.***

The second prong under *Lehnert* considers whether the compelled fee is justified by vital policy interests of the government. *Lehnert,* 500 U.S. at 520. In the context of unions, those policy interests included both labor peace and avoiding free riders, and with the bar "the state's interest in regulating the legal profession and improving the quality of legal services" justified the compelled association inherent in the integrated bar. *Keller, 496 U.S.* at 13-14. While the Regents do not address this prong,[9] through out this appeal the Regents have focused on their interest in education. The Regents also speak of the government's interest in shared governance, or in other words the interest in allowing students to share in the running of the Wisconsin University System.

No doubt there is a vital interest in education, and the government has an interest in allowing students to share the governance of the university system (although whether the latter interest is also "vital" is not clear). However, for the vital policy interest to survive scrutiny under *Lehnert,* it must justify *compelled* funding of the private or quasi-private activity. Neither of these interests presents a vital interest in

[8] The Regents also cite *Hays County Guardian v. Supple,* 969 F. 2d 111, 123 (5th Cir. 1992), and *Kania v. Fordham,* 702 F. 2d 475, 481 (4th Cir. 1983). These cases held that a university could constitutionally fund student newspapers with mandatory student activity fees. We need not consider the correctness of those decisions because the plaintiffs have not challenged the funding of the student newspaper.

[9] The Regents fail to consider the latter two prongs of *Lehnert* (arguably waiving the argument—in fact the Regents do not even cite *Lehnert* in their briefs on appeal). We nonetheless proceed with this analysis, as set forth by the Supreme Court.

compelling students to fund private organizations which engage in political and ideological speech. Again, *Lehnert,* 500 U.S. at 521, illustrates this.

In *Lehnert* non-union members challenged various union expenditures, including "lobbying activities related not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally . . . ." *Id.* at 522 (plurality). In determining the constitutionality of these expenditures, a plurality of the Court analyzed the vital policy interests involved—labor peace and preventing free riders—and concluded "[l]abor peace is not especially served by . . . charging objecting employees for lobbying, electoral and other political activities that do not relate to their collective-bargaining agreement." *Id.* at 521. *Lehnert* further explained that labor peace would not be furthered: "[B]ecause worker and union cannot be said to speak with one voice, it would not further cause harmonious industrial relations to compel objecting employees to finance union political activities as well as their own." *Id.*

While labor peace is not at issue here, the above quotation illustrates the importance of a common cause for justifying the compelled funding. In the context of union cases, where the union and non-union members share a common cause, a vital policy interest justified the compelled funding. But where that was missing, the expenditure could not be justified. In this case while there may be a common cause in education and shared governance, there is no common cause between private organizations which engage in political and ideological speech and the objecting students. Thus, we see no vital policy interest supporting compelled funding of the private associations. And we might even conclude that far from *serving* the school's interest in education, forcing objecting students to fund objectionable organizations undermines that interest. In some courses students are likely taught the values of individualism and

dissent. Yet despite the objecting students' dissent they must fund organizations promoting opposing views they don't graduate.

The Regents also speak of a "free-rider" problem, claiming that because private organizations must open their activities to all students, allowing objecting students to withhold funding would result in a free-rider problem similar to that acknowledged as a vital policy interest in *Abood.* Where, as here, the Regents' own policy allows non-students to join registered student organizations and attend campus activities, they cannot legitimately claim a concern over free riders. Most student organizations subject to this open-access policy receive no funds. Free riders might more accurately describe those organizations that receive a share of the mandatory fees.

Even if objecting students were labeled free riders, the basis underlying the free-rider concern in *Abood is* absent there. In *Abood,* in holding that an employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative, the Court clearly recognized that to hold otherwise would create a free-rider problem. The *reason* a free-rider problem exists in the context of unions, however, is significant (and in the case of student organizations lacking): In the case of unions, the government has imposed on unions the duty to fairly represent all employees, including those who do not belong to the union, and these legal requirements "often entail expenditure of much time and money." 431 U.S. at 221. Forcing non-union employees to fund the union's collective bargaining agreement thus "counteracts the incentive that employees might otherwise have to become free riders—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222.

Conversely, here the private organizations which the plaintiffs object to funding do not act in a representative capacity for the students and have no obligation to fairly represent the students, as the union does for non-union members. Rather, the private organizations' advocacy and speech further positions espoused by the organizations and their members. The political and ideological activities of private organizations are not limited to the university setting, and have ramifications that extend into the diverse aspects of the student's life. In fact, many of the ideological and political activities and speech to which the plaintiffs object occurred off-campus, further limiting the benefit to objecting students. These differences make the free-rider concern inapplicable here.[10] *See also Ellis,* 466 U.S. at 452 (holding that the union could not force non-union employees to fund the recruitment of workers outside the bargaining unit because it did not implicate a free-rider concern: "the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Non-bargaining unit organization is not directed at the employee."); *Lehnert,* 500 U.S. at 521 (rejecting union's free-rider justification for lobbying expenditures, holding that the free-rider concern is inapplicable because "[t]he balancing of monetary and other policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life.").

3. Burdening of free speech.

Even if the Regents could satisfy the first and second prongs, they cannot satisfy *Lehnert's* third and final prong by

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[10] The Regents also seem to argue that because all students benefit from "robust debate," the objecting students are also free riders. While arguably non-speakers benefit from the additional speech, that is not enough: "[P]rivate speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." *Lehnert,* 500 U.S. at 556 (Scalia, concurring).

proving that the forced funding does not "significantly add[ ] to the burdening of free speech inherent in achieving those interests." This prong recognizes that any time the government forces individuals to fund private organizations, a burden on free speech and association may incidentally result, but that burden may be justified by an important governmental interest. Assuming there is a vital governmental interest in funding (which we have concluded there is not), the question then becomes whether a specific expenditure adds to the burden on speech inherent in the mandated funding of the organization in the first instance. If it does, funding those expenditures cannot constitutionally be required even if it is germane to an organization's mission.

In determining whether using compelled fees to fund a private organization which engages in political and ideological activities "significantly adds to the burdening of free speech," we are again guided by *Lehnert*. In *Lehnert*, the Court held that funding political lobbying and using objecting employees' funds to garner public support "present[s] additional 'interference with the First Amendment interests of objecting employees.'" 500 U.S. at 521-22 (internal citation omitted). In doing so, the Court explained:

> [t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable. *[Wooley v.] Maynard, 430 U.S.* 705, 715 (1977). The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

Id. at 522 (plurality). The Court further explained that "[a]though First Amendment protection is in no way limited to controversial topics or emotionally charged issues, the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect." *Id.* at 521-22. If there was any doubt, *Lehnert* makes clear that the Regents' policy cannot stand. Here the burden on objecting students' speech "is particularly great"; the private organizations use the funds to "garner the support of the public in its endeavors," and as "an instrument for fostering public adherence to an ideological point of view" which the students find objectionable. "The degree of impingement upon free expression that the compulsion will effect" is also especially severe given the extent and source of the students' disagreement with the speech engaged in by the organizations which receive their fees. In this case, the speech to which the plaintiffs object includes such emotionally charged issues as abortion, homosexuality, and the United States' democratic system. The source of the plaintiffs' disagreement, as explained at length in their affidavits, is their deeply held religious and personal beliefs.

Notwithstanding these deep-seated beliefs, the Regents attempt to justify forcing the objecting students to fund these organizations because without funding less speech will result, and less controversial speech, and according to the Wisconsin Assistant Attorney General at oral argument, "hateful speech has a place in our society too." That may well be true, but the Constitution does not mandate that citizens pay for it. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such

funds as may be necessary to realize all the advantage of that freedom.' "). *See also,* Thomas Jefferson, Notes on the State of Virginia 233 (2d Amer. ed., 1794) ("[I]t is error alone which needs the support of government. Truth can stand for itself."). In fact it guarantees the opposite—that "we the people" will not be compelled to pay for such speech: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood,* 431 U.S. at 234-35 n.31 (quoting Irving Brant, *James Madison: The Nationalist* (1948)). Yet that is exactly what the Regents do, and to support this policy they again point to the educational benefits flowing from the very speech to which the plaintiffs so strenuously object. That by its nature is an interest in the compelled funding of private

speech, which "significantly adds to the burdening of free speech.[11]

One of the Supreme Court's more recent compelled funding cases, *Glickman v. Wileman Bros. & Elliott,* 117 S.Ct. 2130 (1997), confirms our conclusion. In *Glickman,* a number of growers, handlers, and processors ("respondents") of California tree fruits challenged the constitutionality of various regulations contained in marketing orders which the Secretary of Agriculture promulgated pursuant to the Agricultural Marketing Agreement Act of 1937. The orders at issue imposed assessments on the respondents that covered the costs of administrative expenses and included the cost of generic advertising of California nectarines, plums, and peaches. The respondents argued to the Supreme Court that

[11] The compulsion which Madison condemned is of heightened concern following *Rosenberger*, 515 U.S. 819 (1995), because under *Rosenberger* it would seem that if the university opens up funding to private organizations it must fund not only the Socialists and the Greens, but the Republicans, the Democrats, the KKK, Nazis, and the skinheads; the Nation of Islam, the Christian Coalition, and Catholic, Protestant, Jewish, and Islamic organizations. To others, this engenders a "crisis of conscience." For example, when a Christian campus group sought an ASM operations grant, the Ten Percent Society opposed it, contending that it would be illegal and unconstitutional to fund the proselytizing and anti-homosexual advocacy of this Christian organization.

If the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights. The Regents themselves recognized this important First Amendment concern in passing the University of Wisconsin Financial Policy and Procedure Paper No. 20 which prohibited the use of student activities fees to fund "activities that are politically partisan or religious in nature." As the Regents explained in their reply brief: "The UW-Madison, like the University of Virginia whose policy was challenged in *Rosenberger*, believed at the time that the policy was adopted that it was required to protect students' rights under the First Amendment." The Regents properly recognized the need to protect objecting students' rights under the First Amendment, and that need still exists following *Rosenberger*—in fact it is now more acute.

compelled funding of such generic advertising abridged their First Amendment rights. In a 5-4 decision, the Supreme Court upheld the marketing orders. In upholding the assessment, the Supreme Court relied on

> three characteristics of the regulation scheme at issue to distinguish it from laws that [the Court has] found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, *they do not compel the producers to endorse or to finance any political or ideological views.* (Citing *Abood* and *Keller.)*

Id. at 2138.

The third characteristic, that the assessment does "not compel the producers to endorse or to finance any political or ideological views," *id.*, proved of the utmost significance to the Court's ruling. Throughout its opinion, the Court reiterated the last distinction—that the orders "do not compel the producers to endorse or to finance any political or ideological views." *See, e.g., id.* at 2140 (the germaneness test is clearly satisfied because the generic advertising is unquestionably germane to the purposes of the marketing orders and "in any event, the assessments are not used to fund ideological activities."). In fact, the Court used the *absence* of political and ideological speech to distinguish *Abood*:

> However, *Abood,* and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an

> organization whose expressive [activities] conflict[ ] with one's "freedom of belief." . . . Relying on our compelled speech cases, however, the Court found that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment—the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." (quoting *Abood*, 431 U.S. at 234-35). Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience.

Id. at 2139.

The very factors the Court used to distinguish *Abood*, however, in this case compel the opposite result. The students, like the objecting union members in *Abood,* have a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." *Glickman*, 117 S.Ct. at 2139. And here, unlike *Glickman*, requiring the students to pay the mandatory student activity fees does engender a crisis of conscience. *Glickman*, 117 S.Ct. at 2130. Finally, in the words of the *Glickman* Court: "compelled contributions for political purposes . . . implicated First Amendment interests because they interfere with the values lying at the 'heart of the First Amendment[-]the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.'" *Id.* at 2139

(quoting *Abood,* 431 U.S. at 234-35).[12] In essence, allowing the compelled funding in this case would undermine any right to "freedom of belief." We would be saying that students like the plaintiffs are free to believe what they wish, but they still must fund organizations espousing beliefs they reject. Thus, while they have the right to believe what they choose, they nevertheless must fund what they don't believe.

The Regents respond with a barrage of arguments, none of which have merit, or merit much attention. First, the Regents contend that the district court improperly applied a mixed strict-scrutiny/germaneness analysis. The district court did intermingle these two tests. However, we review this case de novo and have applied the *Lehnert* analysis, so any error on the district court's part is harmless.[13]

The Regents next argue that there is no evidence that the student activity fees were used to fund the actual political or ideological activities the organizations promoted. However, the Supreme Court rejected this argument in *Abood*, 431 U.S. at 237 n.35 (holding that "[it is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes"). Therefore, whether or not the student fees directly fund the political or ideological activities is irrelevant; the First

[12] In *Glickman,* four justices concluded that the First Amendment protects against the government compelling individuals to fund private speech *whether or not the speech at issue is political or ideological.* 117 S.Ct. 2147 (Souter, dissenting). So in *Glickman*, all nine justices rejected as unconstitutional the compelled funding of political and ideological views.

[13] Conversely, the plaintiffs assert that strict scrutiny is the correct standard of review. However, because the plaintiffs win under the *Lehnert* analysis, the plaintiffs cannot complain as to the standard of review. Moreover, while the *Lehnert* analysis derived by the Supreme Court from *Abood* and *Keller* appears to be the appropriate test (as recognized by *Rosenberger*), we note that the Regents' policy also cannot survive the more exacting strict scrutiny standard.

Amendment is offended by the Regents' use of objecting students' fees to subsidize organizations which engage in political and ideological activities. This also means that the Regents cannot earmark the objecting students' activity fees to fund non-political organizations and then continue to distribute the same amount of funding to the political and ideological organizations albeit with funds in "name" paid by non-objecting students. This too is merely a bookkeeping matter, with the end result being that the objecting student subsidizes the political and ideological activities of the organization. *Abood,* 431 U.S. at 237 n.35. The dollars are fungible and splitting the same amount in two directions does not cure the obvious subsidy.

The Regents next argue that because the organizations do not purport to speak for all students, the First Amendment is not violated. This is irrelevant. The First Amendment protects the right to free speech and the corresponding right not to be compelled to fund private speech. These rights are premised on an individual's freedom to say what he wants to say and conversely not say what he does not want to say. It matters not whether a third party attributes the private organization's political and ideological views to the objecting student.

The Regents also attempt to distinguish this case from *Abood* and *Keller* by arguing that here the objecting students can work through the democratic process, whereas in the union and bar association cases that remedy was not available. While it is true that the teachers in *Abood* were not members of the union, and therefore did not have a role in electing union leaders, in *Keller* the objecting attorneys were required to be members of the state bar association and therefore were able to work within the democratic system. Given that *Keller* did not distinguish itself from *Abood* on this basis, we won't either. Actually, there is a more basic flaw in the Regents' reliance on the democratic nature of student representation: The First Amendment trumps the

democratic process and protects the individual's rights even when a majority of citizens wants to infringe upon them.[14]

Finally, the Regents rely on *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Libertarian Party of Indiana v. Packard*, 741 F.2d 981 (7th Cir. 1984), to argue that as the government they can use the student activity fees to fund private organizations even if those organizations engage in political and ideological activities and speech. However, both those cases involved the legislature's appropriation of public funds raised through taxation. In *Buckley*, Congress appropriated income tax revenue to fund political organizations, while in *Libertarian Party* Indiana's legislature appropriated money generated by what in effect constituted a sales tax. 741 F.2d at 990. The student activity fee, however, does not equate to a tax. *Rosenberger* made this clear, stating that "the $14 paid each semester by the students is not a general tax designed to raise revenue for the University. . . . Our decision, then, cannot be read as addressing an expenditure from a general tax fund." *Rosenberger*, 515 U.S. at 841. *See also,* 515 U.S. at 851-52 (O'Connor, concurring) ("The Student Activities Fund, then represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students."). Therefore, *Buckley* and *Libertarian Party* are inapposite.

In sum, we conclude that the *Abood* and *Keller* analysis, as explained in *Lehnert,* governs the students' First Amendment challenge of the Regents' mandatory student fee policy. The Regents have failed to sustain their burden under this three-prong analysis; even if funding private political and ideological organization is germane to the university's mission, the forced funding of such organizations

[14] Also, what good does it do objecting students to work within the democratic process? Even if the objecting students run for, or obtain representation on the ASM, once there they cannot defund organizations whose viewpoint they opposed. *Rosenberger*, 515 U.S. at 833.

significantly adds to the burdening of the students' free speech rights. Therefore, the Regents cannot use the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech. We also hold that the 18 challenged private organizations engage in ideological and political activities and speech, and cannot be constitutionally funded with objecting students' fees.[15]

B. Injunctive Relief

The district court ordered "that the defendants, their officers, employees and other agents shall forthwith cease the funding of private groups that engage in ideological or political advocacy." The district court further ordered that the Regents publish written notice of organizations engaging in political or ideological speech, and the pro rata share of mandatory fees devoted to these organizations, and that the Regents establish an arbitration proceeding for disputes over the amount of fees paid and the nature of the organizations involved.

In issuing the injunction, the district court properly rejected the Regents' proposed procedure for compliance a refund mechanism. In *Ellis*, 466 U.S. at 443-45, the Supreme Court held (in the union context) that a pure rebate approach inadequately protects the constitutional rights of objecting employees:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope

[15] As a result of our decision, we need not consider what the association clause of the First Amendment would add to the students' claim. We also need not consider the plaintiffs' free exercise claim, which was dismissed by the district court as moot.

> of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.

In arguing in support of the refund mechanism, the Regents assert various administrative problems, and contend that it will be impossible to determine the appropriate refund, given that each year the student government determines the level of funding of various activities. But these same administrative burdens face unions and bar associations, and yet the Supreme Court has refused to allow a rebate system to stand: "The only justification for this union borrowing would be administrative convenience. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Id. See also, Hudson*, 475 U.S. at 305 ("[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that the dissenters' funds may be used temporarily for an improper purpose. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear.")[16]

[16] *Hudson* also made clear that nonmembers must be provided adequate information about the basis for the proportionate share, and "given sufficient information to gauge the propriety of the union's fee," and that the union must provide for a reasonably prompt decision by an impartial decision maker concerning the propriety of the fees. Recently, the Supreme Court reaffirmed these procedural protections in *Air Line Pilots Association v. Miller*, 118 S.Ct. 1761 (1998), while also holding that objectors need not exhaust an arbitration remedy before bringing claims in a federal court, unless they had agreed to do so. These same constitutional requirements apply equally to the University of Wisconsin.

But we agree with the Regents that the order is overbroad in some respects. The district court's order enjoining the university from "funding private groups that engage in ideological or political advocacy" applies to both objecting students and non-objecting students, but the plaintiffs pursued only a challenge to contributions made with objecting students' fees. Similarly, the district court's mandate that the Regents "may use mandatory segregated fees *only* for activities reasonably intended to promote its educational mission by providing opportunities and fora for the free expression of diverse viewpoints," fails to limit itself to those fees paid by objecting students. Moreover, the plaintiffs in this case did not argue that the Regents cannot use *any* mandatory segregated fees to fund student activities-they only objected to the use of objecting students' fees, and then only to fund organizations which engage in their own political and/or ideological speech, activities, and advocacy. They did not object to the use of student fees to fund services or student activities which do not involve political or ideological speech and advocacy. Because this portion of the injunction, as worded, goes too far, it cannot stand.[17]

The injunction also establishes rather detailed and specific procedures which the Regents must undertake to administer the distribution of mandatory student activity fees. While it is appropriate to issue an injunction stating what the state cannot do, federalism requires caution in ordering states what to do. We recognized this point in *ACORN v. Edgar*, 56 F.3d 791, 797 (7th Cir. 1995). In *ACORN*, the district court entered an injunction which enjoined state officials from refusing to comply with the law, but also set forth specific details in the form of a mandatory injunction. We concluded

[17] The declaratory judgment likewise included this overbroad language, and to the extent it is inconsistent with our holding today, it is also vacated. For clarity, we again stress that the fees need not be directly used for the political or ideological activities; the Regents cannot use the objecting students' funds to subsidize organizations which engage in political and ideological activities.

that the injunction "failed to exhibit an adequate sensitivity to the principle of federalism," *id.* at 798, explaining that "federal judicial decrees that bristle with interpretive difficulties and invite protracted federal judicial supervision of functions that the Constitution assigns to state and local government are to be reserved for extreme cases of demonstrated noncompliance with milder measures." *Id.* We then reversed the injunction stating that "until it appears that the state will not comply with [an injunction commanding compliance with the law, there is no occasion for the entry of a complicated decree that treats the state as an outlaw and requires it to do even more than the 'motor voter' law requires." In other words, detailed mandatory injunctions "are last resorts, not first." *Id.*

Moreover, "[w]hile a district court has wide discretion in fashioning a remedial injunction, such discretion is not without constraints. Prominent among these restraints is the principle of federalism: 'federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs. . . .'" *Consumer Party v. Davis,* 778 F.2d 140, 146 (3d Cir. 1985). Considerations of comity and federalism require that injunctive relief against a state be no broader than necessary to remedy the constitutional violation. *Lewis v. Casey,* 518 U.S. 343, 362-63 (1996). *See also Clark v. Coye,* 60 F.3d 600, 604 (9th Cir. 1995) ("[I]n reviewing a district court's injunction against an agency of state government, we scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure the compliance with federal law."); *Toussaint v. McCarthy,* 801 F.2d 1080, 1087 (9th Cir. 1986) ("[I]njunctive restraints that exceed constitutional minima must be narrowly tailored to prevent repetition of proved constitutional violations, and must not intrude unnecessarily on state functions."). This is especially true in the context of education, which by its very nature is a local concern.

The district court's injunction went much further than enjoining the Regents from using objecting students' mandatory activity fees to fund organizations which engage in political and ideological activities—the injunction set forth detailed measures which the Regents must undertake. Because the Constitution does not mandate this exact procedure, and because the state has not yet refused to comply with a general negative injunction saying what the State cannot do—paragraphs two through five of the injunction cannot stand.

In addition to the above issues regarding the injunction, the plaintiffs contend that the injunction should have specifically provided that each individual student, and not the University, "must have the final decision as to whether to fund an advocacy group or not before any fees are paid to the University," and that "[t]he University may not define private groups' advocacy as a 'service' to other students in order to require students to fund those groups." We do not think that the district court erred by failing to specifically state the above. However, we reiterate that under our holding above, the University cannot even temporarily collect from *objecting* students the portion of the fees which would fund organizations which engage in political and ideological activities, speech, or advocacy, whether or not the organization also provides some a service in doing so.

III. CONCLUSION

Under the *Lehnert* analysis, the Regents' mandatory student fee policy cannot stand. Funding of private organizations which engage in political and ideological activities is not germane to a university's educational mission, and even if it were, there is no vital interest in compelled funding, and the burden on the plaintiffs' First Amendment right to "freedom of belief" outweighs any governmental interest. We therefore hold that the Regents

cannot use the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech, and they are hereby enjoined from doing so. The Regents, however, are free to devise a fee system consistent with our opinion and Supreme Court precedent; we will not mandate one at this time.

AFFIRMED IN PART,
REVERSED IN PART,
VACATED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

Western District of Wisconsin

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, REBECKA VANDER WERF and REBECCA BRETZ,

Plaintiffs,

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH and GEORGE K. STEIL, SR.,

Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

Case No.: 96-C-292-S

This action came for consideration before the court with District Judge John C. Shabaz, presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the defendants, their officers, employees and other agents shall forthwith cease the funding of private groups that engage in ideological or political advocacy.

IT IS FURTHER ORDERED that judgment is entered declaring that the defendants' use of the mandatory segregated fees to support political and ideological activities violates the First Amendment to the United States Constitution, with costs to plaintiffs.

IT IS FURTHER ORDERED that:

1. The Board of Regents of the University of Wisconsin System may use mandatory segregated fees only for activities reasonably intended to promote its educational mission by providing opportunities and fora for the free expression of diverse viewpoints, and all political or ideological activities must be supported by voluntary fees, user fees or some other source of revenue.

2. Prior to the beginning of each fiscal year the Board of Regents in concert with the students pursuant to Wis. Stats. 36.09(5) shall publish written notice of the activities that can and cannot be supported by the mandatory segregated fee. The notice shall set forth a student's pro rata fee to be devoted to activities that cannot be supported by the mandatory segregated fee. The notice shall be sent to students with their tuition statement. A plaintiff or similarly situated student may withhold the pro rata portion of the student fees budgeted for activities that cannot be supported by the mandatory segregated fee.

3. A plaintiff or student similarly situated who contends that the amount of fees which can be withheld was incorrectly determined may deliver to the Board of Regents a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the student's tuition statement.

4. If one or more timely demand for arbitration is delivered the Board of Regents shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the Board of Regents.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of fees for students who have delivered timely demands for arbitration for the fiscal year, the Board of Regents shall offer such increased pro rata reduction to students enrolled at the University of Wisconsin System after the date of the arbitrator's decision.

IT IS FURTHER ORDERED that plaintiffs' motions to dismiss their pending state claims because they are barred by the Eleventh Amendment and their RFRA claims because RFRA is unconstitutional are GRANTED.

IT IS FURTHER ORDERED that because this Court has found the fee system unconstitutional in violation of the First Amendment right to free speech and association based on the compelling state interest standard plaintiffs' motion to reconsider the free exercise claim is DENIED and the order dismissing it as moot is AFFIRMED.

Approved as to form this 3rd day of September, 1997.

/s/ John C. Shabaz
John C. Shabaz
District Judge

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

By Deputy Clerk _____ Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, REBECKA VANDER WERF and REBECCA BRETZ,

Plaintiffs,

MEMORANDUM AND ORDER
96-C-0292-S

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH and GEORGE K. STEIL, SR.,

Defendants.

Pursuant to its Memorandum and Order dated November 29, 1996 this Court entered amended judgment in the above entitled matter as follows:

THAT JUDGMENT IS ENTERED DECLARING THAT DEFENDANTS' USE OF THE MANDATORY SEGREGATED

FEE TO SUPPORT POLITICAL AND IDEOLOGICAL ACTIVITIES VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, WITH COSTS TO PLAINTIFFS.

It could have provided that which the plaintiffs sought and been done with the matter. In the prayer for relief set forth in their complaint plaintiffs requested injunctive relief against THE REGENTS ordering them and all of their officers, employees and other agents to stop funding private groups that engage in ideological or political advocacy. The court believes in light of the comments from the Court of Appeals that this language may have sufficed. Regardless of its understanding that the parties had agreed to fashion their own remedy in the event a violation of plaintiffs' constitutional rights was found to exist, this Court without addressing an appropriate remedy could have provided the injunctive relief requested rather than the declaratory relief which it believed accomplished the same purpose. It is apparent, however, that the parties are poles apart in fashioning a remedy and once again this Court, or some other court, will be left to the business of addressing the ultimate remedy to be entered.

With this awareness, the Court entered the remedy it believed to be appropriate under the circumstances, utilizing the procedure which had previously been affirmed by the United States Court of Appeals for the Seventh Circuit in *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996). Not only do both parties object to this remedy but neither party agrees with the position of the other. The defendants suggest that in the event a remedy is required the University of Wisconsin will provide it without assistance from this Court. Not only does the University object to any injunctive relief whatsoever, but suggests that in the event a remedy should become necessary neither this Court's suggestion nor that of the plaintiffs should be adopted. Instead the University suggests a non-remedy where the plaintiffs

through a rather cumbersome procedure would make applications for refunds of those fees collected by the University and used to support political or ideological activities in violation of their First Amendment rights. In order to protect their First Amendment rights the plaintiff students would be required to request a refund at the beginning of each and every semester because the amount of the fee and the activities supported thereby would be subject to change.

On the other hand, plaintiffs have suggested that the University should be provided leeway to develop a plan which The Board of Regents believes meets the constitutional requirements expressed in this Court's November 29, 1996 order. Apparently plaintiffs were not aware of the defendants' suggested non-relief. As an alternative plaintiffs suggest an "opt-out" policy where students could select those activities which they wish to support, similar to the federal employees Combined Federal Campaign (CFC).

The Court's proposed remedy which it entered on July 23, 1997 is less intrusive and more workable than the alternatives suggested by the parties. It implements the declaratory relief as previously ordered by the Court in a manner which eliminates the continued involuntary use of student fees to support political and ideological activities in violation of the Constitution.

The University suggests that the Court's proposal is intrusive, overly broad and will not work because it in effect destroys the ability of the students to participate in the distribution of student fees which constitute substantial support for campus student activities as required by Wis. Stat. sec. 36 09(5). To the contrary, a simple reading of the proposed remedy offered by the Court does not in any way suggest that the legislative mandate of shared governance has been ignored or that students will be deprived of their right to

participate in fee disposition. Nonetheless, to remove any doubt, the Court amends its order to ensure that shared governance in the disposition of student fees is continued.

Regardless of the optimism suggested by plaintiffs that a reasonable remedy will be enacted by the University of Wisconsin Board of Regents this Court is of the opinion that its responsibility transcends that misguided optimism and regardless of its formerly held belief that no such remedy need be addressed, judgment will be amended to address those concerns brought to this Court's attention by the Court of Appeals.

Accordingly,

ORDER

IT IS ORDERED that the defendants, their officers, employees and other agents shall forthwith cease the funding of private groups that engage in ideological or political advocacy.

IT IS FURTHER ORDERED that judgment is entered declaring that the defendants' use of the mandatory segregated fees to support political and ideological activities violates the First Amendment to the United States Constitution, with costs to plaintiffs.

IT IS FURTHER ORDERED that:

1. The Board of Regents of the University of Wisconsin System may use mandatory segregated fees only for activities reasonably intended to promote its educational mission by providing opportunities and fora for the free expression of diverse viewpoints, and all political or ideological activities must be supported by voluntary fees, user fees or some other source of revenue.

2. Prior to the beginning of each fiscal year the Board of Regents in concert with the students pursuant to Wis. Stats. 36.09(5) sh ll publish written notice of the activities that can and cannot be supported by the mandatory segregated fee. The notice shall set forth a student's pro rata fee to be devoted to activities that cannot be supported by the mandatory segregated fee. The notice shall be sent to students with their tuition statement. A plaintiff or similarly situated student may withhold the pro rata portion of the student fees budgeted for activities that cannot be supported by the mandatory segregated fee.

3. A plaintiff or student similarly situated who contends that the amount of fees which can be withheld was incorrectly determined may deliver to the Board of Regents a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the student's tuition statement.

4. If one or more timely demand for arbitration is delivered the Board of Regents shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the Board of Regents.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of fees for students who have delivered timely demands for arbitration for the fiscal year, the Board of Regents shall offer such increased pro rata reduction to students enrolled at the University of Wisconsin System after the date of the arbitrator's decision.

IT IS FURTHER ORDERED that plaintiffs' motions to dismiss their pending state claims because they are barred by the Eleventh Amendment and their RFRA claims because RFRA is unconstitutional are GRANTED.

IT IS FURTHER ORDERED that because this Court has found the fee system unconstitutional in violation of the First Amendment right to free speech and association based on the compelling state interest standard plaintiffs' motion to reconsider the free exercise claim is DENIED and the order dismissing it as moot is AFFIRMED.

Entered this 3rd day of September, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, REBECKA VANDER WERF and REBECCA BRETZ,

Plaintiffs,

MEMORANDUM AND ORDER
96-C-0292-S

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH and GEORGE K. STEIL, SR.,

Defendants.

Plaintiffs Scott Southworth, Amy Schoepke and Keith Bannach, each a student at the University of Wisconsin-Madison Law School, commenced this action against the Board of Regents of the University of Wisconsin System alleging that their mandatory segregated fee system violated their First and Fourteenth Amendment rights to freedom of speech, freedom of association, free exercise of religion, their rights under the Religious Freedom Restoration Act, 42

U.S.C. § 2000bb and Wisconsin state law. The parties filed cross motions for summary judgment. This Court denied defendants' motion and granted summary judgment in favor of plaintiffs finding that defendants' mandatory segregated fee system violated plaintiffs' First Amendment rights to freedom of speech and association. Because the Court found that the mandatory segregated fee system violated plaintiffs' First Amendment rights to freedom of speech and association, it did not reach the free exercise of religion, the Religious Freedom Restoration Act or the state law claims. The Court refrained from determining at summary judgment an appropriate injunctive remedy because plaintiffs' represented to it that the parties would resolve the remedy among themselves. Plaintiffs' motion for summary judgment and supporting papers specifically stated:

> This Court needs only to address the question of constitutional *liability* - whether the current mandatory fee system violates the Constitution. Plaintiffs believe that if this Court finds a constitutional violation, the parties can work out an acceptable *remedy* among themselves. If they can't reach agreement on a remedy, then the parties can return to this Court for its judgment on a proper remedy.

(emphasis in original). Pursuant to this representation the Court ordered that judgment be entered declaring that defendants' use of the mandatory segregated fee to support political and ideological activities violated the First Amendment and awaited the parties' submission of a stipulation concerning an acceptable remedy or return for the Court's determination of an appropriate remedy. The parties never agreed to an acceptable remedy nor returned to this Court for its determination.

Defendants nonetheless appealed to the Court of Appeals for the Seventh Circuit. At oral argument the Court of Appeals expressed its concern that this Court's order was not final and appealable because injunctive relief had not been addressed by this Court. Interestingly, plaintiffs argued to the appellate court in supplemental briefing that the district court intended to enter an injunction prohibiting defendants from collecting mandatory student fees unless they provided an opt-out or refund mechanism for students who object to subsidizing the political or ideological views of the student organizations with which they disagree, despite the fact that they specifically requested this Court not to consider appropriate injunctive relief at summary judgment. The Seventh Circuit subsequently found this Court's summary judgment order not to be a final and appealable decision and dismissed defendants' appeal on the ground that it lacked jurisdiction. In its July 11, 1997 order, the Seventh Circuit ordered this Court to address plaintiffs' so-called request for injunctive relief and to unconditionally dismiss the free exercise, Religious Freedom Restoration Act and state law claims.

Accordingly,

ORDER

IT IS ORDERED that:

1. The Board of Regents of the University of Wisconsin System may use mandatory segregated fees only for activities reasonably intended to promote its educational mission by providing opportunities and fora for the free expression of diverse viewpoints, and all political or ideological activities violative of the First Amendment must be supported by voluntary fees, user fees or some other source of revenue.

2. Prior to the beginning of each fiscal year the Board of Regents shall publish written notice of the activities that can be supported by the mandatory segregated fees and the activities that cannot be supported by the mandatory segregated fee. The notice shall set forth each student's pro rata fees to be devoted to activities that cannot be supported by the mandatory segregated fee. The notice shall be sent to all students with their tuition statement. A student may withhold the pro rata portion of the student fees budgeted for activities that cannot be supported by the mandatory segregated fee.

3. A student who contends that the amount of fees which can be withheld was incorrectly determined may deliver to the Board of Regents a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the student's tuition statement.

4. If one or more timely demand for arbitration is delivered the Board of Regents shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the Board of Regents.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of dues for students who have delivered timely demands for arbitration for the fiscal year, the Board of Regents shall offer such increased pro rata reduction to students enrolled at the University of Wisconsin System after the date of the arbitrator's decision.

IT IS FURTHER ORDERED that all claims alleged in plaintiffs' complaint other than their First Amendment freedom of speech and association claims are dismissed as moot.

IT IS FURTHER ORDERED that the parties may pursue objections to the proposed injunctive relief at the telephone status conference previously scheduled for August 6, 1997 at 9:15 a.m.

Entered this 23rd day of July, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued June 4, 1997
July 11, 1997

Before

Hon. William J. Bauer, Circuit *Judge*

Hon. Harlington Wood, Jr., *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

SCOTT H. SOUTHWORTH et al.,

Plaintiffs-Appellees,

Appeal from the United States District Court for the Western District of Wisconsin

No. 97-1001

No. 96 C 0292-S

v.

John C. Shabaz, *Chief Judge.*

MICHAEL W. GREBE et al.,
Defendants-Appellants.

ORDER

Plaintiffs Scott Southworth, Amy Schoepke, and Keith Bannach, each a student at the University of Wisconsin-Madison Law School,[1] sued the members of the

[1] The record indicates that Scott Southworth and Keith Bannach were scheduled to graduate in May 1997, and Amy Schoepke is scheduled to graduate in May 1998.

Board of Regents at the University of Wisconsin System alleging that the Regents' practice of compelling students to pay allocable student fees to fund private ideological and political groups on campus violates their rights of free speech and association, the free exercise clause of the Constitution, and the Religious Freedom Restoration Act. Plaintiffs also alleged pendent state law claims. They sought "declaratory and injunctive relief . . .," specifically:

> Declaratory relief stating that the Regents' policy and practice of giving funds collected through the mandatory student fees to private political and ideological groups is unconstitutional under the United States Constitution, violating the Plaintiffs' rights to freedom of speech, freedom of association, free exercise of religion, and their rights under the Religious Freedom Restoration Act.

They also sought

> injunctive relief against the Regents, ordering them and all of their officers, employees and other agents, to stop funding private groups that engage in ideological or political advocacy; or, in the alternative, to set up a procedure under which students who object to the views expressed by the groups receiving funding may opt out of paying the portion of the mandatory student fee that funds private ideological and political groups.

The parties filed cross-motions for summary judgment. The district court denied the defendants' motion, and granted plaintiffs summary judgment, concluding that the Regents' mandatory allocable segregated fee policy violated plaintiffs' first amendment rights to freedom of

speech and association.[2] But though it ordered declaratory relief, the district court did not address plaintiffs' request for injunctive relief. Rather, it stated that "[b]ecause the parties have agreed to fashion their own remedy in the event a violation of plaintiffs' constitutional rights exists, this Court will not address at this time that which it believes may be that appropriate remedy."

The defendants appealed, asserting jurisdiction was proper under 28 U.S.C § 1291. Section 1291 provides that "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291. A decision is final for purposes of § 1291 if the district court's decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (citation omitted).

Because the district court did not address plaintiffs' request for injunctive relief, this court was concerned that the district court's decision was not final and appealable. At oral argument we pursued this issue with the parties, and requested supplemental briefing on this jurisdictional question.

In their supplemental brief, the defendants cite *Kikumura v. Turner*, 28 F.3d 592 (7th Cir. 1994), and *Abbs v. Sullivan*, 963 F.2d 918 (7th Cir. 1992), in support of their view that the district court's opinion is final and appealable. In *Kikumura*, the plaintiff had filed a complaint alleging that

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[2] Because the court concluded that the mandatory allocable segregated fee policy was unconstitutional, it concluded that "it need not address the alleged violations of plaintiffs' First Amendment rights to free exercise of religion and their rights under the Religious Freedom Restoration Act, 42 U S C. § 2000bb." The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, has since been declared unconstitutional. *City of Boerne v. P.F. Flores, Archbishop of San Antonio*, 1997 WL 345322 (1997).

the defendants' prison policy violated his constitutional rights. The plaintiff sought both declaratory and injunctive relief. The district court denied the plaintiff declaratory relief, but never addressed the issue of injunctive relief. The plaintiff appealed and this court held that it had jurisdiction because "the court unequivocally entered a final judgment here, granting the defendant's motion for summary judgment in its entirety." *Id.* at 594.

The defendants claim that this case presents a comparable situation. It does not. In this case, the district court granted the *plaintiffs* summary judgment; in *Kikumura,* the court granted the *defendants* summary judgment. Thus, in *Kikumura,* there was nothing left for the court to do because the plaintiff lost on the constitutional claim. Here, the plaintiffs won on their constitutional claim, meaning the issue of injunctive relief is still pending.

Abbs is also inapposite. In *Abbs,* the plaintiff sought a declaratory judgment that the government's investigative procedures for scientific misconduct were invalid. The plaintiff also requested injunctive relief. The district court denied as moot the request for a preliminary injunction, but granted the plaintiff declaratory relief. Here, on the other hand, the district court did not deny the request for injunctive relief—it never ruled on the issue.

Notwithstanding these factual distinctions, defendants seize on the following language from *Abbs:* "[F]inality was unaffected by the fact that the plaintiffs might later move for injunctive relief if the government refused to accept the declaration." *Id.* at 923. This, defendants argue, supports a conclusion that this case is final.

Defendants read too much into this statement. The above excerpt merely recognizes that a declaratory judgment is a final judgment even if further relief could later be sought:

> [A]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201.

In other words, if a plaintiff requests only declaratory relief and a court rules on that request, the decision is final and appealable. However, if a plaintiff requests both declaratory *and* injunctive relief, and succeeds in obtaining a declaratory judgment, the district court must decide whether to grant or deny injunctive relief. Until it does so, there is something left for the court to do, and therefore, the district court's decision is not final and appealable. *Peterson v. Lindner*, 765 F.2d 698, 703 (7th Cir. 1985) (concluding that a district court order was not final and appealable even though the court's order was a declaratory judgment because "it nonetheless left unresolved respondent's requests for injunction, for compensatory and exemplary damages, and for attorneys' fees.") (internal citation omitted).[3]

Plaintiffs present a more compelling argument for finality. They contend that the district court in effect ruled on the request for injunctive relief in the declaratory judgment. The plaintiffs point to the district court's statement that "the university must provide some sort of opt-out provision or refund system for those students who object to subsidizing political and ideological student organizations with which they disagree."

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[3] The defendants present other arguments for jurisdiction, most of which question the plaintiffs' right to injunctive relief—a question which is irrelevant for purposes of the jurisdictional issue because the district court never ruled on the request for injunctive relief.

So far we have assumed that the district court did not rule on the request for injunctive relief. But the above excerpt makes us unsure of the court's intent: Did the district court intend to grant injunctive relief as well? It seems not, given that in the very next sentence, the district court stated: "Because the parties have agreed to fashion their own remedy in the event a violation of plaintiffs' constitutional rights exists, this Court will not address at this time that which it believes may be that appropriate remedy."[4] Additionally, in its order, the district court did not mention injunctive relief, instead stating only "that judgment be entered declaring that the mandatory segregated fee policy violates the First Amendment to the United States Constitution." Moreover, in their motion for summary judgment, the plaintiffs informed the district court that it need not rule on their request for injunctive relief:

> This Court needs only to address the question of constitutional liability whether the current mandatory fee system violates the Constitution. Plaintiffs believe that if this Court finds a constitutional violation, the parties can work out an acceptable *remedy* among themselves. If they can't reach agreement on a remedy, then the parties can return to this Court for its judgment on a proper remedy.

Given that the plaintiffs only sought summary judgment on the request for declaratory relief and that it is unclear whether the district court intended to enter an injunction, we cannot conclude that the district court ruled on the plaintiffs' request for injunctive relief. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 320 (7th Cir. 1995) (if it is unclear whether an injunction has been issued, or what conduct might be enjoined, there is no injunction). As *Reich* makes clear, Fed. R. Civ. P. 65(d) requires that an injunction

[4] On appeal, the defendants stated: "The parties did not enter into any such agreement." [Appellants' Supp. Br. at 7.]

be specific in terms and describe in reasonable detail the acts to be restrained, and if the district court's order is "unclear whether an injunction exists or what it enjoins," it has no binding force and cannot be appealed. *Id.*

The plaintiffs contend the district court intended to enter an injunction prohibiting the defendants from collecting mandatory student fees unless they provided an opt-out or refund mechanism for students who object to subsidizing the political or ideological views of student organizations with which they disagree. If so, the court should say so clearly under the procedures set forth in Fed.R.Civ.P. 58 and 65(d). Until the district court clarifies its intent and addresses the request for injunctive relief, the district court's judgment is not final and appealable.

There is yet another jurisdictional problem: In granting plaintiffs summary judgment, the district court did not rule on the plaintiffs' free exercise claim or claim based on RFRA. Additionally, the plaintiffs' reply brief in support of summary judgment asserts that the "plaintiffs withdr[e]w their pendent state law claims," yet it does not appear that the district court entered an order formally dismissing these claims. While a summary judgment ruling that fully disposes of all claims, among all parties, is final, 15B Wright, Cooper & Miller, *Federal Practice and Procedure: Jurisdiction* 2d § 3914.28 (1992), a summary disposition of less than all claims is not final (absent some other applicable jurisdictional provision). *Id.* Thus, on remand, the district court must unconditionally dispose of all remaining counts. *See Horowitz v. Alloy Automotive Co.*, 957 F.2d 143 1, 1335-36 (7th Cir. 1992) (district court cannot create a final and appealable order by dismissing good counts with leave to reinstate); *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1077 (9th Cir. 1994) (stipulation to dismiss remaining claims without prejudice did not convert partial summary judgment into a final and appealable order).

Once these jurisdictional defects are cured—by (1) ruling on the request for an injunction, and (2) disposing of all remaining claims—the case will be final and appealable, and an appeal taken upon the filing of a notice of appeal.[5] Given that the appeal will be successive, Operating Procedures, No. 6, *reprinted in* Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit at 214, and that extensive briefing and argument on the merits has already occurred, any briefing should be limited to the district court's decision concerning injunctive relief and the remaining counts. The court will then "notify the circuit executive whether oral argument is necessary." *Id.*

DISMISSED for lack of jurisdiction.

[5] We assume the case has not become moot. As noted above, two plaintiffs were scheduled to graduate in May 1997, but the remaining plaintiff is not scheduled to graduate until May 1998. It is not clear what claims for non-monetary remedies remain for the plaintiffs who graduated. To prevent any further waste of judicial resources, any substitution of parties or class certification should take place before any successive appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE AND KEITH BANNACH,

Plaintiff(s),

AMENDED JUDGMENT IN A CIVIL CASE

v.

Case No. 96-C-292-S

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH AND GEORGE K. STEIL, SR.,

Defendant(s).

THIS ACTION CAME FOR CONSIDERATION BEFORE THE COURT WITH DISTRICT JUDGE JOHN C. SHABAZ PRESIDING. THE ISSUES HAVE BEEN CONSIDERED AND A DECISION HAS BEEN RENDERED.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS ENTERED DECLARING THAT DEFENDANTS' USE OF THE MANDATORY SEGREGATED FEE TO SUPPORT POLITICAL AND IDEOLOGICAL ACTIVITIES VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, WITH COSTS TO PLAINTIFFS.

Approved as to form this 2nd day of December, 1996.

/s/ John C. Shabaz
JOHN C. SHABAZ
DISTRICT JUDGE

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

by Deputy Clerk

Date

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE AND KEITH BANNACH,

Plaintiff(s),

JUDGMENT IN A CIVIL CASE

v. Case No. 96-C-292-S

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH AND GEORGE K. STEIL, SR.,

Defendant(s).

THIS ACTION CAME FOR CONSIDERATION BEFORE THE COURT WITH DISTRICT JUDGE JOHN C. SHABAZ PRESIDING. THE ISSUES HAVE BEEN CONSIDERED AND A DECISION HAS BEEN RENDERED.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS ENTERED DECLARING THAT THE MANDATORY SEGREGATED FEE POLICY VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Approved as to form this 29th day of November, 1996.

/s/ John C. Shabaz
JOHN C. SHABAZ
DISTRICT JUDGE

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

by Deputy Clerk _____ Date _____

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs, MEMORANDUM AND ORDER

v. Case No. 96-C-0292-S

MICHAEL W. GREBE; SHELDON B. LUBAR; JONATHON B. BARRY; JOHN T. BENSON; BRIGIT E. BROWN; JOHN BUDZINSKI; ALFRED S. DE SIMONE; LEE S. DREYFUS; DANIEL C. GELATT; KATHLEEN J. HEMPEL; RUTH MARCENE JAMES; PHYLLIS ML KURTSCH; VIRGINIA R. MACNEIL; SAN W. ORR, JR.; GERARD A. RANDALL, JR.; JAY L. SMITH and GEORGE K. STEIL, SR., all in their Official capacities as members of the Board of Regents of the University of Wisconsin System,

Defendants.

Plaintiffs commenced the above entitled action against defendants for declaratory and injunctive relief for the alleged violations of plaintiffs' rights to freedom of speech, freedom of association, free exercise religion, and their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Plaintiffs seek a declaration that defendants' imposition of mandatory student fees upon students enrolled as students at the University of Wisconsin is unconstitutional because it compels students to fund

private ideological and political groups on the Madison campus. Jurisdiction exists pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §1343.

The action is currently before this Court on the parties' cross motions for summary judgment.

FACTS

Plaintiffs Scott Harold Southworth, Amy Schoepke and Keith Bannach are three law students currently enrolled at the University of Wisconsin Law School. Plaintiffs Southworth and Bannach are in their third year of law school while plaintiff Schoepke is a second year law student. Defendants are members of the Board of Regents of the University of Wisconsin System being sued in their official capacity. The Board of Regents governs the University of Wisconsin educational system pursuant to authority granted in § 36.09(1), WIS. STATS.

Every student at the University of Wisconsin at Madison ("UW Madison") is required to pay a mandatory, nonrefundable fee each semester. This fee, called the segregated university fee or the segregated fee, is deposited in the state treasury upon receipt by the university. Students refusing to pay the aggregated fee may not graduate or receive their grades from UW-Madison.

Section 36.09, WIS. STATS., gives both the Board of Regents and the students control over the funds generated by the segregated fee. The students' interests are represented on campus at UW-Madison by the student government organization Associated Students of Madison ("ASM"). The Student Services Finance Committee ("SSFC") exists as part of ASM to review both the internal ASM budget and the external university budgets that are funded by the segregated fee.

The segregated fee is divided into two main categories: nonallocable fees and allocable fees. The nonallocable fees are used to fund items such as debt service, fixed operating costs of auxiliary operations, required reserves, the Wisconsin Unions, the first and second year of the recreational sports budget and University Health Services. The SSFC is permitted to comment on how the nonallocable funds are distributed. However, the chancellor has ultimate authority over these funds, and the students' input concerning the distribution of the nonallocable funds is not binding upon the chancellor's decisions.

Section 36.09, WIS. STATS., provides:

> (5) **Students.** The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. *Students in consultation with the chancellor and subject to the final confirmation of the board [of regents] shall have the responsibility for the disposition of those student fees, which constitute substantial support for campus student activities.* The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

(emphasis added). The Board of Regents has determined that student responsibility for the direct disposition of student fees exists only for the allocable portion of the segregated

fee. At UW-Madison, the allocable category of the segregated fee funds the General Student Service Fund ("GSSF"), the Child Care Tuition Assistance Program, the Wisconsin Union Directorate Distinguished. Lectures Series, the third year of the recreational sports budget, the ASM budget, Wisconsin Public Interest Research Group ("WISPIRG") and the United Council.

As previously stated, ASM, in conjunction with SSFC, act on behalf of the students at UW-Madison with respect to the distribution of the allocable portion of the segregated fee. All students at UW-Madison are eligible to participate in the process of reviewing and approving the allocations by running for election to ASM or SSFC. Students are also permitted to attend ASM and SSFC meetings where allocation determinations are made. The process for reviewing and approving allocations for funding is administered by ASM and SSFC in a viewpoint-neutral fashion.

Grants from the UW-Madison student government are available primarily to registered student organizations. To be eligible to register as a registered student organization, a student group must be a not-for-profit, formalized group; composed mainly of students; controlled and directed by students; related to student life on campus; abide by all federal, state, city and university nondiscrimination laws and policies; identify a student as a primary contract person for the organization, provide the Student Organization Office with the information required on the registration form; and abide by the financial and other regulations specified in the Student Organization Handbook.

Registered student organizations can seek funding from the segregated fee in one of three ways. First, a student organization can apply to the SSFC for GSSF funding. Applications for GSSF funding are open to all registered student organizations, in addition to university departments

and community based services. GSSF funding provides a source of funds for those services, which provide direct, ongoing services to significant numbers of UW-Madison students. Second, registered student organizations can seek funding from ASM's Student Activity Fund. These funds also come from the segregated fee and are divided into three different types of grants: operations grants, event grants and travel grants. Finally, registered student organizations can seek funding through a student referendum, whereby the UW-Madison student body approves a specific assessment for a registered student organization by vote during a campus election.

Once ASM and SSFC have approved the disbursements of the allocable portion of the segregated fee, their decisions are sent to the chancellor and the Board of Regents for their review and approval. The Board of Regents has final authority to approve or disapprove the allocations of funds by ASM and SSFC. Student organizations receiving funding from the segregated fee do not get cash or a lump sum payment from the ASM. The organizations must submit a requisition or other appropriate business form requesting payment. An employee of the Office of Dean of Students working with ASM orders the disbursement of the money. Except for membership fees paid in lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the student organizations to pay their bills. Employees of the organizations receiving allocations from the segregated fee receive their salaries or stipends from the university payroll system.

Full-time students attending UW-Madison during the 1995-96 school year were required to pay the segregated fee of $165.75 each semester, for a total of $331.50. The segregated fee for each semester during the 1995-96 school year was distributed as follows:

$ 79.34	University Health Service
$ 46.51	Memorial Union and Union South
$ 13.42	General Student Services Fund (GSSF)
$ 8.20	System Audit reliability Fee
$ 7.78	Intramural and recreational sports
$ 4.76	Child Care Tuition Assistance Program
$ 4.28	Associated Students of Madison (ASM)
$ .75	United Council
$ .71	Wisconsin Public Interest Research Group (WISPIRG)
$165.75	

During the first semester of the 1996-97 school year, full-time students at UW-Madison paid a segregated fee of $190.45 for the first semester, which was distributed as follows:

$ 85.39	University Health Service
$ 48.64	Memorial Union and Union South
$ 20.08	Bus Pass privileges on Madison Metro Transit System
$ 6.48	General Student Services Fund (GSSF)
$ 8.12	System Audit Liability Fee
$ 10.89	Intramural and recreational sports
$ 4.56	Child Care Tuition Assistance Program
$ 4.63	Associated Students of Madison (ASM)
$ .95	United Council
$ .71	Wisconsin Public Interest Research Group (WISPIRG)
$190.45	

With funds generated from the allocable portion of the segregated fee, ASM and SSFC subsidize approximately 140 of the 623 total registered student organizations. Most of these organizations are devoted to academic, cultural or recreational pursuits. The Food Science Club, American Society of Landscape Architects, and the Recreation

Education Club are random, typical examples of registered student organizations receiving distributions.

However, other registered student organizations which obtain funding from the segregated fee are organized, at least in part, to pursue political or ideological goals. Plaintiffs specifically object to the following eighteen student organizations that are funded by ASM or SSFC with proceeds from the allocable portion of the segregated fee: WISPIRG; the Lesbian, Gay, Bisexual Campus Center; the Campus Women's Center; the UW Greens; the Madison AIDS Support Network; the International Socialist Organization; the Ten Percent Society; the Progressive Student Network; Amnesty International; United States Student Association; Community Action on Latin America; La Colectiva Cultural de Aztlan; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Student NOW (Students of National Organization for Women); MADPAC; and Madison Treaty Rights Support Group.

Plaintiffs contend that ASM and SSFC's use of the mandatory segregated fee to subsidize student organizations such as the eighteen aforementioned groups which plaintiffs allege pursue political or ideological goals violates their First Amendment[1] rights to freedom of speech, freedom of association, free exercise of religion, and their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Both parties have moved for summary judgment on the constitutionality of the use of the segregated fee to fund political or ideological activity by registered student organizations.

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[1] Technically, of course, the Fourteenth Amendment is relevant for the limited purpose of incorporating the First Amendment. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 404 (7th Cir. 1996) (citing *McIntyre v. Ohio Elections Com'n*, 115 S. Ct. 1511, 1514 n.1 (1995)).

MEMORANDUM

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A fact is material only if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Id.*

In this case, the parties agree that no genuine issue of material fact exists. Accordingly, this Court is left to determine which of the moving parties is entitled to judgment as a matter of law.

Freedoms of Speech and Association

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Just as the First Amendment prohibits abridgements of the rights to speak and associate, the United States Supreme Court has recognized that among the First Amendment protections are the rights not to speak and not to associate. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Because the imposition of mandatory fees

implicates both freedom of speech and freedom of association, the Court must consider plaintiffs' claims using a strict scrutiny analysis. Strict scrutiny provides that a state may infringe upon one's First Amendment right to freedom of speech or freedom of association if it serves a compelling state interest, unrelated to the suppression of ideas, and cannot be achieved through less restrictive means. *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 n.11 (1986).

In this case plaintiffs contend that the use of the mandatory segregated fees to subsidize student organizations that are engaged in political and ideological activities violates their First Amendment rights not to be compelled to speak and associate. Defendants argue that the mandatory segregation fee does not compel speech on behalf of plaintiffs, but rather funds fora for the expression of different views at the University of Wisconsin. To the extent that the segregated fee infringes plaintiffs' first amendment rights, defendants claim that such infringement is justified by the university's compelling interest in providing opportunities for free and wide-ranging discussion of competing viewpoints. Accordingly, the parties' arguments in this case requires the Court to strike a balance between two very significant competing interests: the plaintiffs' constitutional right not to be compelled to financially subsidize political or ideological activities balanced against the Board of Regents' authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues.

The United States Supreme Court was presented with similar competing interests in two early mandatory fee cases. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), teachers in the Detroit school system challenged the constitutionality of an agency-shop agreement whereby teachers who declined to join the teachers' union would be subject to termination unless they paid a services fee to the

union for benefits received on their part as a result of the union's collective bargaining efforts. The *Abood* Court held that the board of education could compel the non-union teachers to pay a services fee to the teachers' union even though they chose not to join the union. *Id.* at 222-23. However, the Supreme Court found that the union was restricted in the manner it used the non-union employees' service fees. The Court held that the constitutional prohibition against compelled speech and association prohibited a union from using a non-union employee's service fees to fund the expression of political and ideological views that were not germane to the union's purpose of collective bargaining. *Id.* at 234.

The First Amendment principles that underlie the decision in *Abood* were revisited by the United States Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990). *Keller* was concerned with the mandatory payment of dues by lawyers to a state bar association. The plaintiff attorneys in *Keller* objected to the state bar's use of their mandatory dues to fund lobbying on social issues that had little to do with the practice of law, such as nuclear weapons, abortions, prayer in public schools and busing. *Id.* at 15. The state bar defended its position arguing that it was authorized to fund activities "in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." *Id.* (citation omitted). Affirming *Abood*'s holding that the use of mandatory fees must be germane to the purpose of the funded organization, the Supreme Court elaborated in *Keller*:

> *Abood* held that unions could not expend a dissenting individual's dues for ideological activities not germane to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal

> profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 13-14. To summarize, *Keller* and *Abood* teach that the state may compel a person to support an organization if there is a sufficiently compelling reason to do so, and that the organization's use of mandatory contributions must be germane to the purposes that justified the requirement of support." *Smith v. Regents of the University of California*, 844 P.2d 500, 508 (Cal. 1993).

Defendants argue that the mandatory fee doctrine established by the United States Supreme Court in *Abood* and *Keller* is not applicable for two reasons. Defendants first contend that the mandatory fee doctrine is inapplicable to this case because the student organizations that are being subsidized by the segregated fee do not purport to speak for all students, unlike the union in *Abood* and the state bar association in *Keller*. This argument is without merit. An individual's rights to freedom of speech and freedom of association are protected by the First Amendment regardless of whether or not the infringement of said rights is perceived by others. Thus, the fact that the student organizations do not purport to speak on behalf of all students is irrelevant to the determination of whether or not plaintiffs' First Amendment rights have been infringed. If, as in this case, an individual is compelled to subsidize political or ideological activity with which he or she disagrees, First Amendment protections apply because the individual is being forced to support something with which he or she disagrees. Whether or not a third person attributes a student organization's political or ideological position to an individual student does not eradicate the fact that the individual student knows that he or

she is financially supporting an organization that is engaging in activity which he or she finds repugnant. These concerns are identical to those that the Supreme Court considered when it developed the mandatory fee doctrine in the *Abood* and *Keller* decisions.

Defendants also contend that *Abood* and *Keller* are inapplicable to this case because unions and bar associations do not offer the opportunity for dissenting members to work in the democratic process, unlike ASM and SSFC, the student government organizations in this case. This is a distinction without a difference. It is true that the dissenting teachers in *Abood* were not members of the union and therefore did not have a role in the democratic process for electing representatives for the union leadership. However, the dissenting attorneys in *Keller* were required to be members of the state bar association and therefore were provided an opportunity to work within a democratic system to elect their own representatives. The *Keller* Court did not find this distinction relevant when it affirmed its holding in *Abood*. Because the Supreme Court did not find this distinction to be relevant in *Keller*, it follows that the same distinction is also irrelevant in this Court's application of the mandatory fee doctrine.

Further support for the fact that *Abood* and *Keller* are applicable to the issues presently before this Court exists in Justice O'Connor's concurrence in the United States Supreme Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995). Justice O'Connor stated that "although the question is not presented here, I note the possibility that the [mandatory] student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees." *Id.* at 2527. In support of this statement, Justice O'Connor cited both *Abood* and *Keller*, obviously believing that these cases were pivotal in determining the constitutionality of mandatory student fees

being used to subsidize political and ideological student organizations. *Id.* Accordingly, the mandatory fee doctrine as addressed by the United States Supreme Court in *Abood* and *Keller* is applicable to facts involving a university requiring students to pay mandatory student activity fees.

The First Amendment implications of the mandatory fee doctrine were considered in the context of mandatory student fees funding political and ideological student organizations by the California Supreme Court in *Smith v. Regents of the University of California*, 844 P.2d 500 (Cal. 1993). In *Smith*, a number of students at the University of California at Berkeley ("UC-Berkeley") challenged a mandatory activity fee they were required to pay each semester. A portion of the funds generated by this fee was transferred to a student association which financed the UC-Berkeley student government as well as other student activity groups. The plaintiffs objected to funds from their mandatory student fees being used to subsidize sixteen student organizations in addition to the student government because they engaged in political or ideological activity. The plaintiffs claimed that compelling them to provide contributions to these organizations violated their rights to freedom of speech and freedom of association as guaranteed by both the California and United States Constitutions.

The *Smith* court began its analysis by reviewing the United States Supreme Court's mandatory fee decisions in *Abood* and *Keller*. The court then discussed the educational function of a state 1060 (3d Cir. 1985). students challenged the university's policy of funding the New Jersey Public Interest Group ("NJPIRG") with mandatory student fees[2]. The Third Circuit Court Appeals recognized the NJPIRG offered some educational benefits to students, however the court found that such benefits were incidental to the

[2] NJPIRG is the New Jersey counterpart to NYPIRG in the *Carroll* case.

organization's primarily political and ideological purpose. *Id.* at 1065-67. Accordingly, the *Galda* court found that the incidental educational benefits NJPIRG offered were insufficient to justify the infringement of the dissenting students' speech and associational rights. *Id.*

The California Supreme Court determined that the cumulative holdings in *Carroll* and *Galda*, in addition to *Abood* and *Keller*, stood for three principles. First, a state university may support student organizations through mandatory student fees because the use of funds can be germane to the university's educational mission. *Smith*, 500 P.2d at 511. Second, at some point, the educational benefits that the funded student groups offer become incidental to the groups's primary function of advancing its own political and ideological interests. *Id.* Third, while the funding of those student groups may still provide some educational benefits to students attending the university, the incidental benefit to the students' education will not justify the burden on the dissenting students' constitutional rights. *Id.* To reiterate using strict scrutiny vernacular, a state university has a compelling governmental interest in promoting the free expression of ideas on campus by funding student organizations that offer educational benefits. However, at the point where the educational benefits offered by a student organization become incidental to the organization's political and ideological purposes, the funding of said organization is no longer germane to the university's function and therefore is not narrowly drawn or carefully tailored to avoid the unnecessary infringement of dissenting students' constitutional rights.

Defendants acknowledge the existence of the California Supreme Court's decision in *Smith*. However, defendants contend that the *Smith* decision is not persuasive in this case because it is the law only in California and has been widely criticized. While it is true that the *Smith* decision is the law only in California and therefore not

binding on this Court, it is the only decision that has considered a First Amendment challenge to mandatory student fees being used to fund student organizations engaged in political and ideological activities.[3] In support of their argument that the *Smith* decision has been "widely criticized," defendants cite two student written law review articles.[4] However, two critical law review articles written over the course of nearly four years since the *Smith* decision was announced are hardly sufficient to warrant the "widely criticized" label so quickly applied by defendants.

This Court finds the *Smith* decision to be persuasive in this case because the California Supreme Court carefully weighed the same two competing interests in *Smith* as are presently pending before this Court. The *Smith* court ultimately found that the dissenting students' First Amendment rights prevailed over UC-Berkeley's interest in promoting the fee expression of ideas. The *Smith* holding coincides with the purposes our founding fathers act upon when they created the Bill of Rights: to protect the individual from compelled speech or association by the government. As Thomas Jefferson once said, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234-34 n.31 (quoting Brant, James Madison: The Nationalist 354 (1948)) Because the *Smith* court recognized the importance of protecting the

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[3] While the courts in *Carroll* and *Galda* considered First Amendment challenges to mandatory student fees being used to fund specific political organizations, *Smith* is the only case where students challenged the entire mandatory student fee system funding all political and ideological student organizations on First Amendment grounds. *See* 957 F.2d at 993-94; 772 F.2d at 1064.

[4] *See* Robert L. Waring, Comment, *Talk Is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. Rev. 541 (1995); Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 Yale L.J. 2009 (1994).

individual's First Amendment rights to contrast to the power of the government, its analysis is persuasive to this Court in its resolution of the instant case.

Accordingly, just as the *Smith* court found that the students at UC-Berkeley were forced to support groups whose primary function was to promote political and ideological activities, plaintiffs are being compelled to subsidize student organization at UW-Madison whose educational benefits to the UW-Madison campus are incidental to some student organizations' political and ideological activities. This Court need not determine if each and every of the eighteen groups that plaintiffs specifically challenge offer educational benefits that justify the infringement of plaintiffs' speech and associational rights. As long as more than a de minimis number of student organizations are using their funding from the segregated fee to engage in primarily political and ideological activity, defendants infringement of plaintiffs' First Amendment rights cannot be legally justified.

While many of the eighteen student organizations challenged by plaintiffs provide more than incidental educational benefits to the UW-Madison campus, some of them do not. The UW Greens, the International Socialist Organization, the Lesbian, Gay, Bisexual Campus Center and the Ten Percent Society are examples of student organizations registered at UW-Madison that engage primarily in political or ideological activity. The UW Greens is a student organization whose primary purpose is to advance environmentally related causes. Among other activities, the UW Greens sought introduction of bills in the Wisconsin Assembly, distributed literature supporting the Green Party USA and Ralph Nadar for President, and was one of the demonstrated their opposition to Governor Thompson's budget by composting it. The International Socialist Organization's primary purpose is to promote socialism on the UW Madison campus. While this student

organization has provided some educational benefits to the UW Madison campus, such as cosponsoring debates, these benefits are incidental to its purpose of advocating a political and ideological agenda. The International Socialist Organization is really no different that the College Republicans or College Democrats, all of whom are primarily concerned with promoting political and ideological positions. Similarly, the Lesbian, Gay, Bisexual Campus Center is a student organization that is primarily concerned with advancing the homosexual agenda and promoting pro-homosexual political activism. While it does offer some educational services to UW Madison students, these services are incidental to the center's primary purpose of promoting political and ideological goals. Finally, the Ten Percent Society describes itself as a pro-homosexual group that educates members of the UW Madison campus on issues that affect the homosexual community as well as being politically active concerning homosexual issues such as same sex marriages and domestic partner insurance. While there is some educational component to the Ten Percent Society, it clearly is secondary to the group's primary purpose of promoting its political and ideological agendas.

These four student organizations are examples of the types of student organizations at UW-Madison that are engaging in primarily political or ideological activity while being subsidized by the mandatory segregated fee. Even though the existence of these student organizations on the UW-Madison campus contributes to one of the university's functions of promoting the free exchange of perhaps controversial ideas, the primarily political or ideological nature of these student organizations results in the likelihood of some of these groups' positions being repugnant to students who hold a differing political or ideological position. Compelling students who are strongly opposed to the positions that these student organizations advocate to subsidize these organizations which offer no more than limited, incidental educational benefits to the UW-Madison

campus is not narrowly tailored to prevent the infringement of the dissenting students' First Amendment rights. The university's compelling interest in promoting the free exchange of ideas by subsidizing the political and ideological student organizations does not justify such infringement because the university has not carefully tailored the implementation of its interests so as to avoid the unnecessary infringement of the First Amendment rights of those students who disagree with the political and ideological messages being advocated by certain student organizations. This is not to say that these political and ideological student organizations cannot be funded by the segregated fees of those students who do not object. These political and ideological student organizations contribute in a limited manner to the educational function of state universities and can be funded by mandatory student fees such as the segregated fee, however, the university must provide some sort of opt-out provision or refund system for those student organizations with which they disagree. Because the parties have agreed to fashion their own remedy in the event a violation of plaintiffs' constitutional rights exists, this Court will not address at this time that which it believes may be that appropriate remedy.

Defendants' primary argument in support of the constitutionality of the segregated fee system is that the university is not compelling students to speak and associate with political and ideological student organizations, but rather the segregated fee is being used to create a forum for the expression of diverse views. They claim that the segregated fee provides student organizations with the means to present educational opportunities consistent with each organization's purpose, philosophy and goal. Defendants further contend that because the segregated fee creates a forum for the expression of diverse views and which are being distributed in a viewpoint-neutral manner, the mandatory segregated fee does not violate plaintiffs' First Amendment rights. "As the 'speakers corner' of Hyde Park

in London provides a platform for the espousing of social, religious and political ideas by various and divergent individuals, so the student association funds provide the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community." *Lace v. University of Vermont*, 303 A.2d 475, 479 (Vt. 1973)

The United States Supreme Court has found that in some sense student activities fees constitute a forum for speech or association. *Rosenberger*, 115 S.Ct. at 2517. Other courts have found that a university's use of mandatory student activity fees to fund a student newspaper did not violate the dissenting students' First Amendment rights because they provided a public forum for the students to speak and associate. *See Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992); *Kania v. Fordham*, 702 F.2d 475, 479 (4th Cir. 1983); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb. 1973). These cases are distinguishable from this case, however, because they all involved challenges to campus newspapers that were being funded at least in part by student activity fees. Clearly, a newspaper is a forum whereby students may express diverse viewpoints.

In this case, there are clearly many instances where portions of the segregated fee are being used to create a forum for student organizations to express their views. However, there are a number of situations to express their views. However, there are a number of situations where portions of the segregated fee are being used clearly to fund political and ideological activity, not to provide a forum for the free exchange of ideas. For example, both the UW Greens and the Progressive Student Network sought the introduction of two environmental bills in the Wisconsin Assembly. WISPIRG and the UW Greens lead a march to the State Capitol to compost Governor Thompson's budget in order to demonstrate their opposition to it. WISPIRG uses

student interns to lobby state legislators concerning numerous environmental issues. The International Socialist Organization organized pro-labor rallies at the State Capitol and in Congressman Scott Klug's office, in addition to participating in a demonstration around a predominantly black church in protest of speakers opposing homosexuality. These activities engaged in by student organizations funded by a portion of the segregated fee can hardly be said to be creating fora for the exchange of ideas on the UW-Madison campus. In fact, most of these activities did not even occur on the UW-Madison campus. Furthermore, it would be distorting the facts to say that these activities, which are purely political and ideological in their nature, are offering students services or creating a forum for the exchange of ideas.

In an effort to save their forum argument, defendants argue that the segregated fees were not used to fund any political or ideological activities. Therefore, defendants contend that they are entitled to summary judgment because plaintiffs have not demonstrated that portions of the segregated fee directly funded the political or ideological activities to which plaintiffs object. This argument is without merit because whether or not proceeds from the segregated fees actually funded the political or ideological activities is irrelevant. By subsidizing overhead expenses of a political or ideological organization the university subsidizes the entire effort of the particular student group. When faced with a similar argument in the collective bargaining context in *Abood*, the United States Supreme Court reasoned:

> It is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes:
> "[Such a limitation] is of bookkeeping significance only rather than a matter of real substance. It must be remembered that the service fee is admittedly the exact equal of membership initiation fees and monthly dues . . . and that . . . dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining.' Unions 'rather typically' use their membership dues 'to do those things which the members authorize the union to do in their interest and on their behalf.' If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities." *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54.

Abood, 431 U.S. at 237 n.35. Accordingly, it is irrelevant whether the political or ideological activities of student organizations are directly funded with proceeds from the segregated fees. If the student organizations are subsidized at least in part with portions of the mandatory segregated fee, plaintiffs' First Amendment rights are implicated because they are being compelled to support political and ideological activity with which they disagree.

Conclusion

For the aforementioned reasons, this Court finds that the balance between the competing interests in this case tips in favor of plaintiffs' First Amendment rights not to be compelled to speak or associate. Plaintiffs have established

that proceeds from the mandatory segregated fees are being used to subsidize student organizations whose primary purpose is to advance political or ideological causes. Because it has been determined that the educational benefits of some of these student organizations are only limited and incidental to their primary political or ideological purposes, the funding of these student organizations is not germane to the university's function and accordingly not narrowly tailored to avoid the unnecessary infringement of plaintiffs' First Amendment rights.

Because this court finds that the mandatory segregated fees violate plaintiffs' First Amendment rights to freedom of speech and association, it need not address the alleged violations of plaintiffs' First Amendment rights to free exercise of religion and their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that judgment be entered declaring that the mandatory segregated fee policy violates the First Amendment to the United States Constitution.

Entered this 29th day of November, 1996

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs,

v. Case No. 96-C-0292-S

MICHAEL W. GREBE; SHELDON B. LUBAR; JONATHAN B. BARRY; JOHN T. BENSON; BRIGIT E. BROWN; JOHN BUDZINSKI; ALFRED S. DE SIMONE; LEE S. DREYFUS; DANIEL C. GELATT; KATHLEEN J. HEMPEL; RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH; VIRGINIA R. MACNEIL; SAN W. ORR, JR.; GERARD A. RANDALL, JR.; JAY L. SMITH and GEORGE K. STEIL, SR., all in their official capacities as members of the Board of Regents of the University of Wisconsin System,

Defendants.

STIPULATION OF FACTS

Plaintiffs and defendants by their undersigned counsel stipulate for purposes of dispositive motions in this action, the Court may accept the following facts as established:

1. Students enrolled fulltime at the University of Wisconsin-Madison must pay a mandatory fee each semester. This fee is called the segregated university fee or the

segregated fee. The segregated fee money collected from the students is deposited in state accounts.

2. Section 36.09, Wis. Stats., gives both the Board of Regents and the students control over the funds generated by the segregated fee. This is sometimes called "shared governance." Section 36.09(5), Wis. Stats., states:

> STUDENTS. The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the immediate governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

3. The Associated Students of Madison (ASM) exists as the student association entitled to represent students on campus. The Student Services Finance Committee (SSFC) exists as part of the ASM (student government) to review internal ASM budgets and external university budgets that are funded by the segregated fee.

4. The Board of Regents has divided the expenditures of the segregated fee into two main categories, with several subdivisions under each of the two categories.

The two main subdivisions are *allocable* fees and *nonallocable* fees.

5. Full-time students attending the University of Wisconsin-Madison during the first semester 1995-96 school year were required to pay the segregated fee of $165.75 for the first semester. During the second semester, full-time students paid again the segregated fee of $165.75, for a total of $331.50 ($330.00 in segregated fees, and $1.50 to the United Council). The University distributed each student's segregated each semester during the 95-96 school year as follows:

Health (nonallocable): $79.34 -- The University Health Service portion of the segregated fee supports the clinical medicine, health education and public health missions of the student health service.

Union allocable and (nonallocable): $46.51 -- this portion of the segregated fee supports the facilities and programs of the Wisconsin Union. This involves the Memorial Union and Union South and extensive social and cultural programming.

GSSF (allocable): $13.42 -- General Student Services Fund (GSSF) funds an array of services for students and student organizations at UW-Madison. Examples include the GUTS Tutorial, the Student Tenant Union, the Community Law Office, Campus Women's Center, SAFEride bus, WLHA Student Radio, the UW-Greens, the Lesbian Gay Bisexual Center, Madison AIDS Support Network, Rape Crisis Center, Men Stopping Rape and Vets for Vets.

System Audit Liability Fee (nonallocable): $8.20 -- Pursuant to a Legislative Audit Bureau review, the 1985-87 State of Wisconsin Biennial Budget allocated auxiliary reserve balances from other UW System campuses to the benefit of the UW-Madison. Repayment is taking place over a period of ten years through funding from this segregated fee.

Intramural (allocable and nonallocable): $7.78 -- this portion of the fee provides funding for the programs and facilities operated under the Division of Recreational Sports General Programs budget. Major facilities supported in this budget include the Southeast Recreational Facilities (SERF) and the Natatorium.

CCTAP (allocable): $4.76 -- The Child Care Tuition Assistance Program (CCTAP) portion of the segregated fee provides tuition grants to students with children to pay for child care costs.

Student Government Activity (allocable): $4.28 -- The Associated Students of Madison (ASM) portion of the segregated fee supports the operation of the UW-Madison student government association and other student group funding that is distributed by the ASM.

United Council (allocable): $.75 -- This fee supports representation activities by the United Council of Student Governments of UW system institutions. Although strictly not a segregated fee, it is assessed with the segregated fee group but at a flat rate of .75 per student without regard to credit load.

WISPIRG (allocable): $.71 -- WISPIRG is a student group activity involved in a variety of public policy issues and supported by a portion of the segregated fee.

6. During the first semester of the 1996-97 school year, each full-time student paid a segregated fee of $190.45 for the first semester. It was distributed as follows:

Health (nonallocable): $85.39

Union (nonallocable): $48.64

Bus Pass (allocable) - $20.08 -- This is a new category for the 96-97 school year. During the spring, 1996 election,

students approved a referendum to charge each student $20.08 for a pass giving free use on all non-campus Madison Metro Transit System bus routes.

GSSF (allocable): $6.48 -- General Student Services Fund (GSSF).

System Audit Liability Fee (nonallocable): $8.12

Intramural (allocable and nonallocable): $10.89

CCTAP (allocable): $4.56 -- Child Care Tuition Assistance Program.

Student Government Activity (allocable): $4.63

United Council (allocable): $.95

WISPIRG (allocable): $.71

7. Students, acting through the Student Services Finance Committee (SSFC) (a committee that is part of the Associated Students of Madison) are able to review the budgets of the units within the nonallocable category. SSFC may make recommendations, reject the budget or vote to increase the budget. However, the Chancellor has ultimate authority over these units and a SSFC vote is not necessarily binding on him.

8. In January and February 1997, the SSFC will review the proposed budgets by entities that receive their funding from nonallocable fee sources. The Associated Students of Madison (student government) may make recommendations to the Chancellor and the Board of Regents, but the students do not exercise control over the budgets for groups funded from the nonallocable category.

9. Items funded through the *nonallocable* category include:

- Debt service
- fixed operating costs of auxiliary operations,
- required reserves
- student health services
- Wisconsin Union
- the first and second year of the Recreational Sports Budget
- University Health Services

10. The Board of Regents has determined that student responsibility for the direct disposition of student fees exist only for the *allocable* portion of the segregated fee. Under sec. 36.09(5), Wis. Stats., students have primary responsibility for the formulation and review of policies concerning "student life, services and interests." At UW-Madison, the chancellor has agreed that "student life, services and interests" includes:

a) The regisuration and regulation of student organizations;

b) Non-academic social, cultural and recreational programs for students; and

c) Those services that are initiated and operated by students.

11. On the Madison campus, the *allocable* fee category funds the following:

- General Student Service Fund (GSSF)
- Child Care Tuition Assistance Program (CCTAP)
- Wisconsin Union Directorate Distinguished Lectures Series
- the third year of the Recreational Sports budget

- the Associated Students of Madison budget
- WISPIRG (Wisconsin Public Interest Research Group)
- United Council

12. The Associated Students of Madison (ASM) has complete authority over most of the allocable funding, in conjunction with the Student Services Finance Committee (SSFC). In addition, some allocable funding may be approved via student referendum. All students are permitted to participate in the process of reviewing and approving allocations by running for election to ASM or SSFC, as well as attending and participating in ASM and SSFC meetings where allocation determinations are discussed. The process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion.

13. Some student organizations that receive funding from the segregated fee receive their funding from the category of the allocable fee called the General Student Services Fund (GSSF). The student groups apply for funding to the Student Services Finance Committee (SSFC). The General Student Services Fund provides a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students. GSSF funds should also contribute significantly to student health, safety or academic success.

14. Applications to the GSSF are open to all registered student organizations, university departments or community based services. Student government activity grants are available only to Registered Student Organizations. To be eligible to register as a Registered Student Organization, a student group must meet the following criteria:

- it must be a not-for-profit, formalized group.

- it must be composed mainly of students.

- it must be controlled and directed by students.

- it must be related to student life on campus.

- it must abide by all federal, state, city and University nondiscrimination laws and policies.

- it must identify a student as a primary contact person for the organization and provide the Student Organization Office with the information required on the registration form.

- it must abide by the financial and other regulations specified in the Student Organization Handbook.

15. Registered Student Organizations can seek funding from the segregated fee in several ways:

- seek funding via a student referendum.

- seek GSSF (General Student Services Fund) funding through the Student Services Finance Committee (SSFC).

- seek Student Government Activity funding through the Associated Students of Madison (ASM).

16. Registered Student Organizations may seek funding through a student referendum. The students vote at an election on whether to approve the assessment for the student group or not.

17. Registered Student Organizations can also apply for GSSF funding from the Student Services Finance Committee (SSFC) for funding from the segregated student fee. If a student organization receives GSSF funds, it may not receive an ASM Operations Grant at the same time. However, it may receive an ASM Events Grant while receiving GSSF funds. During the 95-96 school year, the SSFC distributed $974,200.00 in GSSF funding from the segregated fee to the following organizations:

Student Services Finance Committee (Admin.)	8,400.00
Student Services Finance Committee (unallocated)	11,051.00
SAFEride Bus	165,000.00
Community Law Office	10,435.00
UW Greens	6,905.00
GUTS	56,342.00
Madison AIDS Support Network	26,070.00
Men Stopping Rape	20,136.00
Lesbian, Gay & Bisexual Center	22,042.00
Radio Station	481,673.00
Rape Crisis Center	27,101.00
Student Leadership Program (SLP)	12,815.00
Adventure Learning Program (ALP)	13,050.00
Student Tenant Union	33,340.00
U.S.S.A.	38,000.00
Vets for Vets	7,640.00
Campus Women's Center	34,200.00
Total	974,200.00

Student organizations seeking funding through this method must apply for funding to begin the next fiscal year.

18. Most Registered Student Organizations seek funding from the Student Government Activity Fund through the Associated Students of Madison (ASM). These funds come from the segregated fee. These student groups can apply for *Operations Grants*, *Event Grants* or *Travel Grants*.

Operations Grants - Registered Student Organizations seeking an Operations Grant must apply to the ASM by March for funding in the next school year. New student organizations or groups that did not apply for funding the previous spring may apply for a Last Minute Operations Grant, which is limited to a maximum of $250.00. During the 95-96 school year, ASM awarded 81 operations grants for a total of $30,902.00, ranging from $100.00 to $863.00, with the average grant being $382.00. During the 95-96 school year, the ASM awarded 39 Last Minute Operations Grants totaling 3, 954.00, ranging from $40.00 to $175.00, for an average of $101.00.

Event Grants - Registered Student Organizations may apply for funding of a specific event. These events must be in the Madison area and open to all students. During the 95-96 school year, the event grants ranged from $150.00 to $7,000.00, with the average event grant being $1279.00. During the 95-96 school year, the ASM approved 57 event grants for a total amount of $72,893.00.

Travel Grants - Registered Student Organizations may apply for funding of travel that is central to the purpose of the organization. During the 95-96 school year, travel grants ranged from $150 to $400, with the average travel grant being $255. During the 95-96 school year, the ASM approved six travel grants totaling $1528.00.

19. The total amount of money from the Student Government Activity Fund that the ASM distributed during 95-96 school year for operations grants, last minute operations grants, event grants and travel grants is $109,277.00.

20. After the ASM and the SSFC have approved the disbursements of allocable money, their decisions are sent to the Chancellor and the Board of Regents for their review and approval.

21. Student organizations receiving funding do not get cash or a lump sum payment from the ASM. The organizations must submit a requisition or other appropriate business form requesting payment. An employee of the Office of Dean of Students working with ASM orders the disbursement of the money. Except for membership fees paid in lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the organization itself to pay its bills. Employees of organizations receiving allocations receive their salaries or stipends via the university payroll system.

22. The SSFC can freeze the funding of a student group at anytime.

23. Under sec. 36.09(5), Wis. Stats., the Board of Regents has final authority to approve or disapprove the allocations of funds by the student government.

24. Registered Student Organizations can reserve University facilities for meetings and events. Nonacademic space in the Memorial Union, Union South and many other campus buildings, including recreational, athletic and outdoor campus areas can be reserved for meetings by Registered Student Organizations.

25. The following documents are attached to this stipulation. They are true and correct copies and may be admitted into evidence:

a. Full-Time Segregated Fee Dollar Distributions, First Semester 1995-96

b. Full-Time Segregated Fee Dollar Distributions, First Semester 1996-97

c. 1995-96 Associated Students of Madison Grant Allocations

d. University of Wisconsin System Segregated Fee Allocations by Institution -- Fiscal Year 1995-96, University of Wisconsin-Madison.

e. The Student Services Finance Committee current policy statement

f. University of Wisconsin-Madison Allocable/Non-Allocable Segregated Fee Distribution 1995-96 Annual Budget

g. The University of Wisconsin System Financial Policy and Procedure Paper Number 20-Rev (3), dated June 8, 1987.

h. Student Organization Handbook 1996-97 -- Student Organization Office, University of Wisconsin-Madison, Dean of Students Office.

i. Student Services Finance Committee -- student organization application for 1996-97 GSSF funding.

JAMES E. DOYLE
Attorney General

Dated:_____

_____
SUSAN K. ULLMAN
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Defendants

NORTHSTAR LEGAL CENTER

Dated:_____

_____
JORDAN W. LORENCE
Attorney for Plaintiff

[ATTACHMENTS NOT INCLUDED]

Supreme Court, U.S.
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No. 98-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, *et al.*,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

JORDAN W. LORENCE
NORTHSTAR LEGAL CENTER
P.O. Box 2074
Fairfax, VA 22031
(703) 359-8619

Counsel of Record

DANIEL KELLY
REINHART, BOERNER,
VAN DUEREN NORRIS
& RIESELBACH S.C.
1000 North Water Street
Milwaukee, WI 53202
(414) 298-8284

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QUESTIONS PRESENTED

Whether students at the University of Wisconsin have a First Amendment right under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and its progeny to opt out of paying a mandatory fee that funds private campus organizations engaged in political and ideological advocacy that the students forced to pay find objectionable, even if the University distributes the funds in a viewpoint-neutral forum like the one in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)?

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BRIEF OF THE STUDENTS IN OPPOSITION

The main question in this case is whether a state university can violate the free speech rights of students under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) to opt out of paying a mandatory fee funding political and ideological advocacy of private campus groups. The University of Wisconsin ("University") claims that students lose their *Abood* rights to opt out of paying a mandatory fee if the University operates a viewpoint neutral forum of money like the one in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). But this Court did not intend for *Rosenberger* to nullify students' *Abood* rights. The Seventh Circuit accurately ruled that the University needlessly pits *Abood* against *Rosenberger*, stating that the First Amendment principles addressed in *Rosenberger* deal with the distribution of student fees, while the principles of *Abood* address the collection of student fees. Therefore, the Seventh Circuit correctly ruled that students have a First Amendment right under *Abood* to opt out of paying a mandatory fee that funds the political and ideological advocacy of private campus organizations, even if the fee money is distributed in a viewpoint neutral manner as required by *Rosenberger*.

STATEMENT OF THE CASE

In its petition for a writ of certiorari, the University of Wisconsin neglected to state important facts about this case. The students requested an opt out from mandatory funding of campus organizations that engage in blatant political and ideological activism. For example, the students objected to funding organizations that published voter guides evaluating how well candidates for Congress supported the organization's legislative agenda, and they objected to funding various organizations that lobbied the Wisconsin Legislature for

support or defeat of various pieces of legislation.

The University Requires Students to Pay the Fee

The Board of Regents requires all students enrolled at the University of Wisconsin-Madison to pay a mandatory fee, called the "segregated fee." Appellees' Appendix at the Seventh Circuit ("A.A.") at 131. The University will not allow students to graduate or receive their grade transcripts if they refuse to pay the mandatory fee. Answer ¶ 9. There is no way that students may receive a refund of the portion of the fee that funds campus organizations the students find objectionable. Answer ¶ 1. Full-time students attending the University of Wisconsin-Madison during the first semester 1995-96 school year were required to pay a mandatory fee of $331.50. A.A. at 132.

A large portion of the student fee money pays for things not at issue in this case -- the student health service, a shuttle bus service, the campus radio station, a study help center, etc. A.A. at 136. In this case, the students only objected to the funding of campus organizations who engaged in political and ideological advocacy.

The Fee Funds Less Than 1/3 of All Campus Groups

Most student groups at the University of Wisconsin - Madison flourish and speak their diverse voices without any subsidies coerced from unwilling students. In the 1995-96 school year, there were 623 Registered Student Groups at the University of Wisconsin-Madison. Appellees' Appendix ("Ae.A.") at 218-34. The total number of student organizations that received any fee money at all was 183, A.A. at 139, meaning that 29% of the registered student groups received funding from the fee and 71% of the student groups did not

even apply for funding and operated successfully on campus without using money coerced from others. Most of the student organizations that receive mandatory fee money received $1000 or less. A select group of 17 campus organizations received large allotments from the mandatory fee, ranging from $6905.00 to $481,673.00 each for providing "services" to students on campus. A.A. at 139. Some of these services were legitimate services with no component of advocacy, such as the shuttle bus and the study center. Those services are not challenged in this lawsuit. However, a number of these groups received thousands of dollars and the only "service" they provided were such things as organized lobbying efforts at the state capitol on the organization's legislative agenda, work on the causes promoted by the funded organization and the "service" of disseminating the funded organization's viewpoints on campus.

Student organizations seeking funding must go through an extensive application process. Although any Registered Student Organization may apply for funding, the student government and the Board of Regents determine which organizations will receive money and how much. A.A. at 135-141. There is no guarantee that a student organization will receive any money at all from the mandatory fee fund. The student government and the Board of Regents have total discretion to decide which organizations will have access to the forum of mandatory fee money. The student government funds the Wisconsin Public Interest Research Group (WISPIRG) with mandatory fee money through a separate account only for that organization. A.A. at 134.

The Funded Campus Organizations Engage in Political and Ideological Advocacy

In the record before the Seventh Circuit, the students

who object to paying the fee presented myriad examples of funded campus organizations engaging in political or ideological advocacy. Here are some examples to show why the students sought to opt out of paying the fee.

WISPIRG

The Wisconsin Public Interest Research Group (WISPIRG) received $49,500.00 from the segregated fee during the 1995-96 school year. Cert. Pet. at 18a. WISPIRG describes itself as "one of the state's leading consumer and environmental watchdog groups." Ae.A. at 13. WISPIRG published a Congressional scorecard for the 1994 election in which it evaluated each candidate for the House of Representatives from every congressional district in Wisconsin, and gave scores depending on whether the candidate supported or opposed the WISPIRG legislative agenda. Cert. Pet. at 18a.

During the 1995-96 Session of the Wisconsin Assembly, WISPIRG asked legislators to introduce three bills to restrict mining in Wisconsin. *Id.* All three of these bills say that they were introduced "by request of ...Wisconsin Public Interest Research Group (WISPIRG)." On April 21, 1996. WISPIRG and the UW Greens (another fee-funded group) led a "Wisconsin Earth Day March" to the State Capitol to protest Governor Tommy Thompson's budget, and "composted" the budget once they reached the Capitol building. Cert. Pet. at 18a-19a. Additionally, WISPIRG sends one quarter of its student fee money each year to support WISPIRG's parent organization, U.S. PIRG, in Washington D.C. to support U.S. PIRG's lobbying at the U.S. Congress. *Id.* at 18a.

Campus Women's Center

The Campus Women's Center received $34,200.00

from the segregated fee during the 1995-96 school year. Cert. Pet. at 19a. The Campus Women's Center was created in 1983 "as a student organization committed to working against sexist attitudes and behaviors in order to strengthen the entire community." Appellees' Brief to the Seventh Circuit, 97-1001, p. 13.

During the 1996 session of the Wisconsin Legislature, the Campus Women's Center worked against a bill requiring "informed consent" from women seeking abortion and requiring a 24 hour waiting period. Ae.A. at 69. The Campus Women's Center wrote:

> We must act now to block the bill. You can obtain a copy of the bill at the Legislative Reference Bureau. Familiarize yourself with its contents and get prepared to defend women's rights to reproductive choice when the bill hits the Senate floor in March. For more information or to find how you can become further involved, contact Jennifer at the Campus Women's Center: 262-8093. ♀

Cert. Pet. at 19a.

The Campus Women's Center published articles in its newsletter urging people to oppose another bill on abortion at the Wisconsin Legislature and to defeat a "Defense of Marriage Act" bill that would have prohibited legal recognition for same sex marriages. Ae.A. at 82-83.

UW Greens

The UW Greens received $6,905.00 from the segregated fee during the 1995-96 school year. Cert. Pet. at

18a. The UW Greens describe themselves as part of a movement that "provides an opportunity for a merger of spiritual, community and alternative institutions. This synthesis, in combination with political action, will ultimately lead to the changes which are necessary in society if we are to maintain the earth and its inhabitants." Ae.A. at 105.

During the 1996 presidential campaign, the UW Greens distributed from their office campaign literature supporting Ralph Nader's bid for President on the Green Party ticket, as well as general information about the Green Party USA, a political party. Cert. Pet. 18a. The UW Greens lobbied at the state legislature on various bills dealing with mining. *Id.* The record shows that the UW Greens opposed use of Bovine Growth Hormone in milk and dairy products, urged people to boycott Shell Oil and embargo Nigerian exports because of Nigeria's alleged environmental and human rights abuses, and oppose "Structural Adjustment Programs" imposed by the World Bank on poor Third World nations. Ae.A. at 111, 113, 115 and 117.

Progressive Student Network

During the 1995-96 school year, the Progressive Student Network received a grant from the mandatory fee of $590.00. A.A. at 147. This activist group "focuses on a wide variety of current issues including military/biotech research on campus, ROTC discrimination against queers, racist mascots in sports, the crisis of hunger and homelessness, free trade (NAFTA/GATT), welfare reform, political prisoners and prison organizing, environmental racism, ecofeminism and women's empowerment, rightwing backlash on campus, the GOP's 'Contract with America,' etc..." Cert. Pet. at 20a.

The Progressive Student Network also distributes its

Disorientation Manual at the UW-Madison campus, a publication funded by the mandatory student fee. The Disorientation Manual criticized the Board of Regents and Governor Tommy Thompson for the way they spent money on projects and programs at the University. The Disorientation Manual also promoted homosexuality:

> Congratulations! You've stepped out of whatever homohating hometown you probably "grew up" in and have come to the only Midwestern mecca where gay rights exist, bisexuals can flirt shamelessly, and our family is so comfortable that we can even afford that sociopolitical luxury of infighting.
>
> Of course, isn't it odd that the military Reserve Officer Training Corps (ROTC) openly discriminates against homosexuals but is still allowed on campus (despite UW policy). Also, spouses of UW students get UW health benefits, while legally-sanctioned "domestic partners" (the only way for homosexuals to marry in WI) of UW students don't.

Ae.A. at 172.

International Socialist Organization

During the 1995-96 school year, the International Socialist Organization received an operations grant from the segregated fee of $350.00. A.A. at 121.

The International Socialist Organization promotes socialism through debates, rallies, conferences, etc. The organization had an Internet web page during the 1995-96

school year in which it espoused its various ideas:

> Although workers create society's wealth, they have no control over its production and distribution. A socialist society can only be built when workers collectively seize control of that wealth and democratically plan its production and distribution according to human needs instead of profit...
>
> Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown.

Cert. Pet. at 19a; Ae.A. at 134.

The International Socialist Organization opposes the Republicans' Contract with America, supports affirmative action, and opposes "racism, sexism and homophobia." Ae.A. at 138-39; 141.

The International Socialist Organization, along with the UW Greens and other groups, co-sponsored a series of events on May 5-6, 1996 to celebrate International Workers Day. The events included a "Worthy Wage Rally in support of child care workers" at the state capitol and a rally in support of workers' rights at Congressman Scott Klug's office. Cert. Pet at 19a; Ae.A. at 144.

On April 12, 1995, the International Socialist Organization joined with others in a demonstration at a predominantly black church in Madison because it was sponsoring two speakers who oppose homosexuality. Cert. Pet. at 19a; Ae.A. at 128-131. About 400-500 demonstrators

massed outside of the church, holding signs, chanting, blowing whistles, beating metal garbage can lids, etc. Ae.A. at 129. The protestors chanted "Queer Mob Rule," "Hey, Hey, Ho, Ho, Homophobia's Got to Go and "2, 4, 6, 8, We Don't Want Your Christian Hate." *Id.* One demonstrator repeatedly shouted, "Bring Back the Lions," alluding to the Roman Empire's persecution of the early Christians. *Id.*

Other student organizations

The students who filed this lawsuit also submitted evidence of other student organizations funded by the mandatory fee that have engaged in political or ideological advocacy. See Ae.A. at 183-87; 192-97; 198-201; 44-62; 119-120; 210-11; 212-17; 202-3; 208-9; 204-5; 206-7; 145-161; 188-91:

Amnesty International
Community Action on Latin America
La Colectiva Cultura de Aztlán
Lesbian, Gay Bisexual, Transgender Campus Center
Madison AIDS Support Network
MADPAC
Madison Treaty Rights Support Group
Militant Student Union
National Organization for Women (student chapter)
Student Labor Action Coalition
Student Solidarity
Ten Percent Society
United States Student Association

The Objecting Students

The complaint was filed by three law students enrolled at the University of Wisconsin-Madison's law school. Other

students joined the lawsuit as the original plaintiffs graduated. All of the students described themselves as holding a conservative political philosophy and beliefs, as well as a Christian religious faith. Appellees' Brief to the Seventh Circuit, 97-1001 at 6-8. The students oppose legalized abortion and homosexuality, support the free enterprise system, reasonable environmental regulations and the Contract for America, among other positions. *Id.*

These students believe that all students have the right to express their opinion at the University by distributing literature on campus, renting rooms at the University for speakers advocating their viewpoints, lobbying the Wisconsin Legislature and the Congress, supporting and opposing political candidates, conducting protest marches, etc. *Id.* However, they object to the views of many of the student groups receiving funding from the segregated fee. They believe that they should be able to attend the University without the Board of Regents requiring them to fund student groups who express views they oppose. *Id.*

The students filed their action under 42 U.S.C. §1983, seeking the right to opt out of paying the portion of the mandatory fee that funds the organizations they find objectionable. The district court and the Seventh Circuit both agreed that the students have a First Amendment right to opt out of paying the mandatory fee under *Abood* and its progeny, such as *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). By a 7-4 vote, the Seventh Circuit rejected the University's petition for rehearing en banc.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT CORRECTLY RULED THAT *ABOOD* PRINCIPLES CONTROL THIS CASE, NOT THOSE OF *ROSENBERGER*

A. This Court Indicated in *Rosenberger* That *Abood* Governs a Student Fee Opt Out Case.

This Court need not review the Seventh Circuit's decision because it correctly applied the *Abood* principles as explained by this Court in *Rosenberger*. The Seventh Circuit ruled that students have a First Amendment right as explained in *Abood, Keller, Lehnert,* and other decisions, to opt out of funding political and ideological advocacy of private campus organizations, even if the money is distributed through a *Rosenberger*-type nonspatial forum of money in a viewpoint-neutral manner.

The students have not asked in this lawsuit that certain campus organizations be censored or silenced on campus, or that certain groups totally be cut off from funding from the mandatory fee. The Seventh Circuit correctly stated the students' constitutional claims in this case: "But the students do not ask that we restrict the speech of any student organization; they merely ask that they not be forced to financially subsidize speech with which they disagree." *Southworth v. Grebe*, 151 F.3d 717, 721 (7th Cir. 1998); Cert. Pet. at 20a. The students have asked, like the dissenting workers in *Abood,* that the government not force them to fund the political and ideological advocacy of private organizations. The University is free to distribute money in a viewpoint-neutral manner (*Rosenberger*) if the funds are collected from students who voluntarily

contribute it (*Abood*).

The Seventh Circuit correctly stated that the students have sought protection for their First Amendment right not to speak, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) and their right not to be compelled to subsidize others' speech, as stated in *Abood* and *Keller*. *See Southworth*, 151 F.3d at 722; Cert. Pet. at 22a. Therefore, the students seek to opt out of contributing to a fund that finances advocacy of groups they find objectionable. The organizations are free to continue advocating their viewpoints, but with money that has been voluntarily contributed.

The University claims that if it could show that it operates a viewpoint-neutral forum of funding like that at issue in *Rosenberger*, then the students have no *Abood* right to opt out and the University may force students to pay the fee that funds groups they find objectionable. But this is not what the First Amendment requires. There is no conflict between *Abood* and *Rosenberger*. The University (and the Seventh Circuit dissenters from denial of rehearing en banc) needlessly thrust *Rosenberger* into conflict with *Abood*.

The Seventh Circuit properly read *Rosenberger* to address the constitutional principles surrounding the distribution of mandatory student fees, and *Abood* to address constitutional principles relevant to the collection of student fees. The Seventh Circuit stated:

> The Regents try to shoehorn this case into *Rosenberger*. However, as the Court made abundantly clear, it considered only the disbursement of student activity fees; it did not consider the constitutionality of forcing students to fund private political and ideological

> organizations. *Rosenberger*, 515 U.S. at 840.

Southworth, 151 F.3d at 722, n. 1; Cert. Pet. at 23a, n.1.

The Eighth Circuit recently reached the same conclusion about the application of *Rosenberger* to mandatory student fee cases involving the University of Minnesota:

> The nondiscriminatory distribution by the University of funds available for the support of student organizations as required by *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995), is not at issue in this action because the University's system for distributing the fees collected has not been challenged by the plaintiffs. Rather, the plaintiffs challenge only the right of the University to compel them to pay fees for the support of advocacy groups they do not wish to support. *Cf. id.* at 840.

Curry v. Regents of the University of Minnesota, ___ F.3d ___, 1999 U.S. App. LEXIS 1459, *4 n. 4 (8th Cir. Feb. 1, 1999).

This Court in *Rosenberger* directed that the question of whether students have a First Amendment right to opt out of funding objectionable campus advocacy groups was controlled by *Abood* and *Keller*, and was not answered in *Rosenberger*. 515 U.S. at 840. The Seventh Circuit followed this direction:

> While *Rosenberger* did not consider the question we have before us, in noting what was not before it, the Court directed us to the *Abood* and *Keller* analysis.

Southworth, 151 F.3d at 722; Cert. Pet. at 22a. The Seventh Circuit then referenced this passage from this Court's majority opinion in *Rosenberger*:

> The [student] fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller v. State Bar of California*, 496 U.S. 1, 15-16 (1990) and *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235-236 (1977).

Rosenberger, 515 U.S. at 840.

In addition to the majority opinion in *Rosenberger* pointing to *Abood* and *Keller* to decide a student fee opt-out case and the issue of collecting student fees, Justice O'Connor in her concurring opinion in *Rosenberger* expressed an openness to the position that the First Amendment principles expressed in *Abood* and *Keller* allow students to opt out of paying into a fund that gives money to campus groups they oppose:

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. [Citations to *Keller* and *Abood*]. There currently exists a split in the lower courts as to whether such a challenge would be successful [Citations omitted].

Rosenberger, 515 U.S. at 851.

In order to apply the *Abood* principles, the Seventh Circuit used the test enunciated in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991) because it is the latest in the *Abood-Keller* line of cases: "Beyond *Abood* and *Keller*, the Supreme Court has addressed the issue of germaneness in several other cases...*Lehnert*'s three-prong analysis is the test today." 151 F.3d at 724; Cert. Pet. at 26a. Therefore, the Seventh Circuit applied *Abood* and *Keller*, as this Court directed to do in *Rosenberger*, by using the latest expression of the *Abood* test in *Lehnert*.[1]

In sum, *Rosenberger* in no way undermines the First Amendment principles spelled out in *Abood, Keller* and *Lehnert*. Nor does *Rosenberger* sanction the compelled collection of student fees as the University argues. *Rosenberger* addresses how money is distributed -- government cannot engage in viewpoint discrimination when distributing student fee money to campus organizations. *Abood, Keller* and *Lehnert* address how student fee money is collected -- government cannot compel students to fund campus advocacy

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[1] The students urged the Seventh Circuit to use a straightforward compelling state interest test, although it was appropriate for that court to have used the *Lehnert* test, because it reflects *Abood* principles. *Lehnert*'s test is, if anything, overly favorable to the petitioner University. *Lehnert's* test in a union dues case takes into account the "free rider" problem -- a dissenting worker who does not pay union dues still receives the higher wages and benefits negotiated by the union. In contrast, there is no "free rider" issue here, as the Seventh Circuit found. 151 F.3d at 728; Cert. Pet. at 35a. There is no equivalent in a student fee context to the increased benefits won by a union for its workers. The only "benefit" or "service" the students receive from the groups at issue in this case is the one of listening to them advocate their own ideological agendas. The *Lehnert* test represents a weaker standard for student fee cases than the context requires.

groups absent a compelling government interest. Thus, there is no contradiction or conflict between the principles of *Rosenberger* and those of *Abood* and *Keller*, as the Seventh Circuit found.

B. Forum Analysis Does Not Contradict the Seventh Circuit's *Abood-Lehnert* Analysis.

The University and the Seventh Circuit dissenters claim that the panel erred by not using forum analysis and rejecting the students' claims because there is a "critical difference between being forced to support the speech of a particular group and being compelled to provide funding to create a forum for speech by any group," Cert. Pet. at 14. This is in error, because students' *Abood* rights are not neutralized in a *Rosenberger* forum.

First, there is nothing inherently contradictory about allowing dissenters to opt out of funding a forum of money that funds organizations advocating ideas the dissenters oppose. There is no conflict in asserting that the First Amendment protects both (1) the right of campus organizations to viewpoint -neutral access to distribution of student fee money and (2) the right of students not be to forced to fund objectionable political or ideological advocacy groups. The University can implement both the *Rosenberger* principles and the *Abood* principles simultaneously.

Second, the University glosses over the significant role the student government and the Board of Regents have in selecting who has access to the *Rosenberger* forum of funding. The student government and the Board of Regents in this case have total power to decide which groups have access to the forum of money. They peruse detailed applications, hold hearings and deliberate as legislative bodies to decide which

groups will receive money and how much they will get. A campus organization has no guarantee that the student government will exercise its discretion to give them money, and at the University of Wisconsin, 71% of the student organizations receive no fee money at all.

In contrast, the government plays a much smaller, passive role with a physical forum, like an auditorium or a park. The private groups or individuals, not the government, decide whether they want to access the government's park or auditorium and engage in advocacy. The only role the government has, if any, is a ministerial role to schedule access to the physical forum.

The third reason why *Abood* principles should operate in a *Rosenberger* forum is that when the forum is money, the funded group's advocacy consumes the forum. In order to speak using a *Rosenberger* forum of money, the funded organization must spend the money, thereby "consuming" the forum. A second group cannot reuse the same money because it is gone. In contrast, a physical forum like an auditorium or a park remains after one group uses it for its advocacy to be used later by those with differing viewpoints. Judge Rovner failed to account for this "consumption of the forum" effect when she wrote in dissent, "the burden on objecting students' speech is lessened by the availability of the same funds to present opposing speech." *Southworth v. Grebe*, 157 F.3d 1124, 1126-27 (7th Cir. 1998); Cert. Pet. at 6a. Because the act of advocacy consumes a *Rosenberger* forum, allowing student *Abood* rights to opt out of paying the fee before the advocacy group spends it is the appropriate way to protect the objecting students' right of conscience and right not to speak.

If the University's and the dissenters' reading of *Rosenberger* is correct, then a state university could force

Jewish students to fund a Christian evangelistic newspaper like the one in *Rosenberger*. State universities could force African-American students to fund neo-Nazi or Ku Klux Klan organizations. If there is no right to opt out of paying the fee in this case, then no student can opt out of paying the fee in any context. This harsh result is obviously not what this Court was suggesting in *Rosenberger* as the way to resolve the student fee cases.

There is nothing inherent in the nature of the forum analysis that requires all people to pay to support the forum. The Seventh Circuit did not err by recognizing the students' *Abood-Lehnert* rights in the context of a *Rosenberger* forum.

II.

THIS COURT NEEDS TO SEND A CLEAR MESSAGE TO THE LOWER COURTS THAT *ROSENBERGER* AND *ABOOD* ARE NOT IN CONFLICT

The question of whether students can opt out of paying a mandatory fee that funds groups the students find objectionable has percolated among the state and federal appeals courts since the early 1970s. The University detailed the split among the circuits and the state appellate courts. Cert. Pet. at 10-12. As the respondents see it, the Seventh Circuit, the Third Circuit and the California Supreme Court have all recognized a right of students to opt out: *Southworth, Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985) and *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 16 Cal. Rptr.2d 181, 844 P.2d 500 (1993), *cert. denied*, 510 U.S. 863 (1993).

The cases in clearest conflict with those listed above are the Second Circuit's opinions in *Carroll v. Blinken*, 42 F.3d

122 (2d Cir. 1994) and an earlier appeal in the same case, *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992). The Second Circuit recognized very little *Abood*-type protection for students objecting to funding the New York chapter of the Public Interest Research Group, NYPIRG.

The Fourth Circuit, the Fifth Circuit, and the state supreme courts of Washington, Vermont and Nebraska have rejected students' *Abood* claims to opt out of paying the mandatory fee, generally in the context of funding a student newspaper on campus: *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), *cert. denied* 506 U.S. 1087 (1993); *Good v. Associated Students of the University of Washington*, 86 Wash.2d 94, 542 P.2d 762 (1975); *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973) and *Larson v. Board of Regents of the University of Nebraska*, 189 Neb. 688, 204 N.W.2d 568 (1973).

Some of these earlier decisions did not have the benefit of this Court's 1977 opinion in *Abood*. And none but the Seventh Circuit's decision in *Southworth* had the benefit of this Court's direction given in *Rosenberger* to use *Abood* and *Keller* to decide these student fee cases.

The Seventh Circuit correctly followed the direction of this Court in *Rosenberger* in decide this case. Therefore, the petition for a writ of certiorari should be denied.

The only reason for this Court to grant review in this case would be if this Court desired to spell out more directly the two-part solution for the student fee question that it alluded to in *Rosenberger*: a state university must distribute student fee funds to campus organizations in a viewpoint neutral manner, but the university must protect students' right of individual

conscience by allowing them to opt out of funding campus organizations who engage in advocacy the individual students finds objectionable. In short, *Rosenberger* holds that campus organizations have viewpoint neutral access to funds, but further suggests that a state university cannot force students to fund campus organizations that they find objectionable.

This Court recognized the "distribution" half of this two-part solution in *Rosenberger* and strongly implied that *Abood*'s opt out principles provides the solution to the other half, the "collection" half, of the student fee situation. That is what the Seventh Circuit ruled in this case.

In *Southworth*, the Seventh Circuit correctly followed this Court's lead. The other circuits should be given the opportunity to reconsider contrary precedents in light of *Rosenberger* and *Southworth*. Whatever this Court decides to do, it should make it clear that *Abood* and *Rosenberger* are not in conflict. Students have *Abood* rights that operate in a *Rosenberger* forum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Date: February 26, 1999

Respectfully submitted,

JORDAN W. LORENCE
Northstar Legal Center
P.O. 2074
Fairfax, Virginia 22031
(703) 359-8619
Counsel of Record

DANIEL KELLY
Reinhart, Boerner, Van Dueren
Norris, and Rieselbach
1000 North Water St.
Milwaukee, Wisconsin 53202
(414) 298-8284

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No. 98-1189

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO THE BRIEF IN OPPOSITION

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

**Counsel of Record*

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REPLY TO THE BRIEF IN OPPOSITION

This brief responds to respondents' brief in opposition.

I. SINCE THE FILING OF THE PETITION, THE NINTH CIRCUIT HAS DECIDED A CASE CONCERNING THE FIRST AMENDMENT'S LIMITS ON A PUBLIC UNIVERSITY'S FUNDING OF STUDENT SPEECH WHICH EXPRESSLY REJECTS THE SEVENTH CIRCUIT'S REASONING IN THIS CASE.

On February 23, 1999, the Ninth Circuit issued a decision in *Rounds v. Oregon State Board of Higher*

Education, No. 97-35189, 1999 WL 86684 (9th Cir. Feb. 23, 1999), upholding the imposition of mandatory incidental student fees contributed to the support of the Oregon Student Public Interest Research Group Education Fund (OSPIRG EF).[1] Based on factual differences concerning the use of the challenged fees, the Ninth Circuit did not view its decision as conflicting with the Seventh Circuit's decision in the present case, to the extent the latter concerned the collection and distribution of student fees earmarked for the Wisconsin Public Interest Research Group (WISPIRG).[2] *Id.* at *8. However, the Ninth Circuit rejected the Seventh Circuit's broader approach to funding of all student groups, expressly stating that "[t]o the extent *Southworth [v. Grebe*, 151 F.3d 717 (7th Cir. 1998)] holds that a public university may not constitutionally establish and fund a limited public forum for the expression of diverse viewpoints, we respectfully disagree . . . ." *Id.* at *9 n.5. Indeed, the Ninth Circuit relied on a forum analysis similar to that rejected by the court of appeals in this case in concluding that the OSPIRG EF funding was constitutional. *See, e.g., id.* at *7 ("[t]hrough this process, the University has created a limited

[1] Respondents' brief in opposition notes the Eighth Circuit's decision, issued February 1, 1999, in *Curry v. Regents of the University of Minnesota*, No. 98-3284, 1999 WL 42242 (8th Cir. Feb. 1, 1999). Br. in Opp'n at 13. The decision is interlocutory, addressing the claimed right of student organizations to intervene in a lawsuit similar to the instant one, challenging the University of Minnesota's funding of campus organizations that engage in ideological or political advocacy with which the plaintiffs disagree. *Curry*, 1999 WL 42242, at *1. The decision does not consider whether the First Amendment would *permit* a public university to provide such funding on a viewpoint neutral, or any other, basis. However, ruling that the proposed intervenors lack standing, the Eighth Circuit states that student groups have no legal or constitutional right to *compel* unwilling students to provide financial support for their activities. *Id.*

[2] WISPIRG's funding is unique among all of the student organizations receiving funding through the student fee at the University of Wisconsin, Madison, including the eighteen that respondents object to, in that it is approved by special referendum of the student body.

public forum, see *Rosenberger [v. Rector and Visitors of the Univ. of Va.]*, 515 U.S. [819,] 830 [(1995)], that encourages 'a diversity of views from private speakers,' *id.* at 834").

II. THE BRIEF IN OPPOSITION UNDERSCORES THE NEED FOR CLARIFICATION OF THIS IMPORTANT AREA OF FIRST AMENDMENT LAW.

1. While opposing certiorari, much of the brief in opposition supports review. Respondents directly argue that this Court should send "a clear message" to the lower courts that *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), are not in conflict. Br. in Opp'n at 18.

2. Even when arguing that the Seventh Circuit's decision follows this Court's instruction in *Rosenberger* to use *Abood* to decide student fee opt out cases, Br. in Opp'n at 11-16, respondents confirm the need for resolution of this important First Amendment issue. Both respondents and the Seventh Circuit read *Rosenberger* as determining the validity of the University of Wisconsin's fee system. *See* Br. in Opp'n at 13, quoting *Southworth v. Grebe*, 151 F.3d 717, 722 (7th Cir. 1998) (Pet.-Ap. 22a). This is plainly wrong. *Rosenberger* expressly left open the question of an objecting student's right to opt out of a fee used to fund other students' expressive activities:

> The [student] fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-236 (1977).

Rosenberger, 515 U.S. at 840. *See also id.* at 851 (O'Connor, J., concurring) (noting the possibility of a free speech challenge by an objecting student to paying for speech with which she disagrees).

3. While respondents and the Seventh Circuit are properly criticized for reading *Rosenberger*'s precedent too expansively, respondents offer an analytic alternative to the forum analysis presented in the petition and underlying Judge Wood's and Judge Rovner's dissents below (Pet.-Ap. 2a-12a). At several points in the Brief in Opposition, respondents argue that while *Rosenberger* requires the viewpoint neutral *distribution* of fees used to fund student expression, *Abood* requires the strictly voluntary *collection* of such fees. *See* Br. in Opp'n at 11-12, 15.

The Regents regard respondents' alternative standard as deficient both because it reduces *Rosenberger* to a requirement that student groups be voluntarily funded and because it lacks a principled basis. There is no obvious logic to requiring viewpoint neutrality in the distribution of funds which have been collected on a voluntary basis. The distribution of funds based on a donor's preferences would ordinarily not be regarded as viewpoint neutral, while the constitutional significance of the governmental action would be little more than that of a collection intermediary. Moreover, respondents' collection/distribution dichotomy ignores the fact that creating a forum open to all speakers, whether or not the forum is spatial, furthers, rather than transgresses, First Amendment values.

On this issue, respondents argue that under the Regents' forum analysis a public university could require Jewish students to fund a Christian evangelistic newspaper or compel African-American students to fund neo-Nazi or Ku Klux Klan organizations. Br. in Opp'n at 17-18. Respondents also draw a distinction between the creation of a spatial forum, which has public good attributes, and the

provision of non-spatial resources to facilitate student expression, such as the funding provided in *Rosenberger* and in this case, whose consumption is necessarily adverse to other groups. *See* Br. in Opp'n at 17.

We agree that these are considerations raised by the questions presented. Conceivably, a university retains some authority to impose viewpoint neutral restrictions on a student group's ability to obtain *Rosenberger* funding--such as provisions against certain types of discrimination in membership, *see, e.g.*, Pet.-Ap. 106a-107a, ¶14--which might mitigate the neo-Nazi example. But for the most part, respondents have correctly extended forum analysis to its logical conclusion. Yet it is also the case that general tax levies can be used to construct public auditoriums in which Christian evangelistic services may be held or to provide the law enforcement necessary to preserve public order at a Ku Klux Klan rally. With respect to the expressive activities of student groups receiving university funding on a viewpoint-neutral basis, the long-standing First Amendment response to objectionable speech--that of more, not less, speech--remains the most sound. This response seems particularly appropriate where the speech occurs at a nationally prominent, public university.

With respect to respondents' public good/private good distinction, the Regents do not believe these paradigms from economic theory are capable of providing the content of the First Amendment. Without a substantial retreat from *Rosenberger*, the public good character of the resources provided for private expression is not determinative. Limited resources may, in fact, run out before all speech has been funded, without a distribution mechanism losing its character as viewpoint neutral. The same could happen when two or more groups wanted to use a public auditorium at the same time and date.

Respondents' counter arguments are legitimate and need to be answered. This case provides a suitable opportunity to answer the question that *Rosenberger* reserved and to provide the needed framework for future cases.

III. NOTWITHSTANDING RESPONDENTS' EFFORTS TO DISTANCE THEMSELVES FROM THE FACTUAL STIPULATIONS HELPING TO FRAME THE QUESTIONS PRESENTED, THE CASE REMAINS APPROPRIATE FOR DEFINING THE FIRST AMENDMENT'S LIMITS ON A PUBLIC UNIVERSITY'S FUNDING OF STUDENT SPEECH AND SERVICES.

Respondents attempt to distance themselves from their stipulations in the district court that "[t]he process for reviewing and approving allocations for funding [of student groups] is administered in a viewpoint-neutral fashion," Pet.-Ap. 106a, ¶12, that the service, or GSSF, component of the challenged fee constitutes "a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students," Pet.-Ap. 106a, ¶ 13, and that "GSSF funds should also contribute significantly to student health, safety or academic success." *Id.* Without even commenting on their stipulation, respondents chose to describe the system for distributing funding for student expression as one that provides "no guarantee that a student organization will receive any money at all from the mandatory fee fund." Br. in Opp'n at 3. Respondents further assert that under the challenged system, "[t]he student government and the Board of Regents have total discretion to decide which organizations will have access to the forum of mandatory fee money," *id.*, *see also id.* at 16-17, although no

part of the record is cited for this.[3] As with several parts of the Seventh Circuit's decision, respondents do not treat any of their factual summary as disputed--in which case the questions presented would be appropriately framed by the procedure for summary judgment--but as established in the manner most favorable to respondents' view of the case.

The reason for this approach is that respondents would like this Court to decide whether a public university is constitutionally restricted to using voluntary collections to fund student expression, "even if the University distributes the funds in a viewpoint-neutral forum like the one in *Rosenberger*," Br. in Opp'n at i, but without foregoing a later challenge to the neutrality of the distribution process, should their constitutional interpretation be rejected. Respondents' dual purpose of asking this Court to provide guidance to the

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[3] Similarly, respondents refer to the University's claiming that "it could show that it operates a viewpoint-neutral forum of funding like that at issue in *Rosenberger* . . ." Br. in Opp'n at 12. On the issue of student groups receiving funding to provide campus services, respondents refer to a "select group" of seventeen campus organizations receiving between $6,906 and $481,673. *Id.* at 3. On the one hand, they acknowledge that "[s]ome of these services were legitimate services with no component of advocacy, such as the shuttle bus and the study center." *Id.*. In the next breath, they assert that "the only 'service' . . . provided were such things as organized lobbying efforts at the state capitol on the organization's legislative agenda, work on the causes promoted by the funded organization and the 'service' of disseminating the funded organization's viewpoints on campus." *Id., see also id.* at 15 n.1 ("The only 'benefit' or 'service' the students receive from the groups at issue in this case is the one of listening to them advocate their own ideological agendas").

The Regents acknowledge that the stipulations regarding the viewpoint neutrality of the distribution process and the provision of services to a substantial portion of the student body were simplifying assumptions, used to focus the issues in litigation. However, it was respondents' decision to so frame their case. Had they wanted to challenge the viewpoint neutrality of the fee distribution system--essentially, an application of *Rosenberger*—or the provision of actual student services, this would have been a much different lawsuit presenting significantly different legal issues.

lower courts on the issues presented by the petition, while simultaneously distancing themselves from the factual stipulations which help frame the questions presented, gives the Brief in Opposition a somewhat schizophrenic quality.

It does not, however, render the case less appropriate for decision of these important First Amendment issues. A number of procedural rules are sufficient to keep the case from straying factually from its central legal controversy. These range from the binding effect of a party's stipulation, to the methodology for deciding cases on summary judgment, to the obligation of a party opposing a petition for writ of certiorari to point out any perceived misstatement of fact or law in the petition, bearing on the issues that would be before the Court, were the petition to be granted. As in any case, to the extent factual issues need to be resolved before final judgment can be entered, the case can be remanded to the court of appeals for action consistent with this Court's ruling.

More importantly, the opposition of conceptual frameworks that was evident in the court of appeals' decision and in the dissents of Judges Wood and Rovner, continues to be squarely presented by this case. Petitioners regard the imposition of a student fee, distributed to student organizations on a viewpoint-neutral basis, as fundamentally similar to the opening of a park, auditorium, university mall or other public forum. Respondents regard such a fee system as not different from the collection of union dues that are contributed to a specific political campaign. The court of appeals understood *Rosenberger* to require viewpoint neutral funding. *Southworth*, 151 F.3d at 722 (Pet.-Ap. 22a) ("The Supreme Court held that the student activity fees created a fora of money and that once established the fora had to be made available on a viewpoint-neutral basis"). It was precisely this possibility which the court regarded as anathema to individual liberty. *See id.* at 730 n.11 (Pet.-Ap. 40a) ("under *Rosenberger* it would seem that if the university

opens up funding to private organizations it must fund not only the Socialists and the Greens, but the Republicans, the Democrats, the KKK, Nazis, and the skinheads; the Nation of Islam, the Christian Coalition, and Catholic, Protestant, Jewish, and Islamic organizations. . . . If the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities--that is the only way to protect the individual's rights").

By resolving this fundamental difference in the conception of publicly subsidized expression, this Court will provide to the lower courts--and to the nation's public universities--the analytical framework for consistent and principled decisions in this important area of the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

*Counsel of Record

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER CAMPUS CENTER AT THE UNIVERSITY OF WISCONSIN-MADISON AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

*Patricia M. Logue
Ruth E. Harlow
LAMBDA LEGAL DEFENSE
& EDUCATION FUND, INC.
11 East Adams Street, Suite 1008
Chicago, Illinois 60603
(312) 663-4413

Attorneys for Amici Curiae

**Counsel of Record*

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STATEMENT OF INTEREST[1]

Amici curiae, with the consent of the parties, submit this brief, pursuant to Supreme Court Rule 37.2, in support of the petition for writ of *certiorari* filed by The Board of Regents of the University of Wisconsin System, *et al.* *Amici* have a direct interest in this matter, which concerns the mandatory student fee system at the University of Wisconsin ("University" or "UW") that funds certain activities and expenses of student organizations at the University.

The Lesbian, Gay, Bisexual and Transgender Campus Center ("LGBT Center")[2] is a registered student organization at the University. Its purposes include "to provide education on lesbian, gay and bisexual histories, cultures, health and politics[;] . . . support services[;] . . . social and cultural programs, and materials for the use of any student or community member[;] . . . [and] a centralized body for the storage and dissemination of research." The LGBT Center also advocates for a "more pluralistic university environment" and better relations among students and student groups. Affidavit of Susan K. Ullman, Attachment B, October 28, 1996. Through the student fee funding system at issue in this case, the LGBT Center has received General Student Services Fund ("GSSF") grants and Associated Students of Madison ("ASM") event grants. The LGBT Center was found by the District Court and the Court of Appeals to engage in "political

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[1]Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus curiae*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

[2]During the proceedings below, the LGBT Center was known as the Lesbian, Gay and Bisexual Campus Center or "LGB Center."

and ideological" activities that require the University to diminish the LGBT Center's funding according to individual students' objections to the group's expression. Appendix to Petition for a Writ of Certiorari ("App.") at 18a, 43a-44a, 93a-94a.

Lambda Legal Defense and Education Fund ("Lambda") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Lambda has long fought in the courts to protect the expressive and associational rights of all persons, including lesbian and gay college students and organizations that advocate equality for gay people. In addition, Lambda's lawyers often visit university campuses (including UW) and give speeches at the behest of student groups; they also provide Lambda publications and other resources to such groups. Thus, Lambda has a direct interest in overturning the decision below and making sure that its own expression is not thwarted by the threat that student group hosts will lose their funding if they facilitate Lambda's communication.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by petitioners. The central holding of the decision below is as follows:

> [T]he First Amendment is offended by the Regents' use of objecting students' fees to subsidize organizations which engage in political and ideological activities. This also means the Regents cannot earmark the objecting students' activity fees to fund non-political organizations and then continue to distribute the same amount of funding to the political and ideological organizations albeit with funds in "name" paid by non-objecting students. This too is merely a bookkeeping matter, with the end result being that the objecting student subsidizes the political and ideological activities of the organization.

App. 43a-44a.

REASONS FOR GRANTING THE WRIT

This case and others like it[3] call for the Court to shore up longstanding constitutional principles that apply to public fora for First Amendment activity and to stop the erosion of *amici's* freedoms of speech and association that inevitably will result from the decision below. App. 1a-12a. At the expense of *amici* and other disfavored groups, the University is forced by the Court of Appeals' decision to apply a more restrictive approach to forum access for student groups engaging in political or ideological activities than is applied to all other groups and to allow the popularity of a political or ideological message to dictate the extent of participation in the public forum. This is done in the name of avoiding "compelled speech" when, in fact, no such offense is occurring. The First Amendment injury that should concern the Court will be done not to respondents but to *amici* and their peers, at a loss to the whole UW community. *Amici* urge the Court to grant review here to clarify the important limits on "compelled speech" claims and the constitutional

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[3]In addition to the adjudicated cases cited by petitioners, other pending cases presenting similar issues include *Curry v. University of Minnesota*, Civil No. 98-583 (D. Minn.), and *For the Love of God v. Powell*, No. C-1-98-733 (S.D. Ohio).

validity of funding a limited public forum through mandatory student fees.[4]

I. It Is Not "Compelled Speech" To Be Required By Government To Contribute To A Limited Public Forum That Is Viewpoint-Neutral In Operation.

The First Amendment, of course, "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). There is also "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, ___ (1997), 117 S. Ct. 2130, 2139; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Here, however, the Court of Appeals confuses payments to construct a stage with being forced to speak upon it or to fund an organization that uses it. In paying their fair, equal share for a limited public forum that provides a platform for expression from all sides, respondents are not being compelled to speak, associate with, or directly subsidize any particular message or organization. None of the

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[4]As petitioners show, there is conflict and confusion in the circuits as to the proper analysis and outcome in cases like this one. In addition to the cases cited by petitioners, see *Rounds v. Oregon State Board of Higher Education*, __ F.3d __, 1999 WL 86684 (9th Cir. Feb. 23, 1999), and *Veed v. Schwartzkoff*, 353 F. Supp. 149 (D. Neb. 1973), *aff'd without op.*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974). *Rounds* concludes that "[t]o the extent that *Southworth* holds that a public university may not constitutionally establish and fund [through mandatory student fees] a limited public forum for the expression of diverse viewpoints [in the face of objecting students' claims under the First Amendment], we respectfully disagree." 1999 WL at *9 n.5.

fees paid by matriculating students go directly to any organization; they are paid to UW, deposited in the state treasury, and paid out by the University for documented expenses of student groups.[5] App. 100a-101a (¶1), 110a (¶21). And when *amici* take the forum stage, they do not speak for UW, objecting students or the student body as a whole; they speak for themselves and hope their ideas are engaging. Respondents, who have equal access to the fee forum stage to express opposing points of view, suffer no First Amendment injury from contributing to its maintenance.[6]

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[5]*Cf. Carroll v. Blinken*, 957 F.2d 991, 997-98 (2d Cir. 1992) (facts of forced membership and direct transfer of funds to organization emphasized in finding cognizable compelled association).

[6]Even if some minimal infringement upon respondents' First Amendment "interest" existed, *Glickman*, 521 U.S. at ___, 117 S. Ct. at 2139, their claim would not trigger the analysis borrowed from *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), by the Court of Appeals or the strict scrutiny invoked by the District Court, but instead a more lenient balancing test. *Glickman*, 521 U.S. at ___, 117 S. Ct. at 2140; *Abood*, 431 U.S. at 225. *See also Carroll*, 957 F.2d at 999 (applying less than strict scrutiny to claim arising from allocation of students' fees); *Good v. Associated Students of Univ. of Wash.*, 86 Wash. 2d 94, 104, 542 P.2d 762, 768 (1975) (employing balancing test in challenge to mandatory fee supporting the Associated Students of the University of Washington).

"Government may abridge incidentally individual rights of free speech and association when engaged in furthering the constitutional goal of 'uninhibited, robust, and wide-open' expression." *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983); *see also Rounds*, 1999 WL 86684 at *6-*7. UW's interest in creating a diverse, open forum for student group expression is vital, *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957), and as an essential component of effective public education, easily outweighs any small infringement on their rights that plaintiffs conjure. Under the proper balancing test that should apply if plaintiffs are found to have some First Amendment injury here, UW's carefully tailored

The Court of Appeals did not recognize that, upon acknowledging that the UW student fee system constituted a limited pubic forum, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (comparable student fee funding scheme at University of Virginia created "a forum more in a metaphysical than in a spatial or geographic sense, but the same [limited public forum] principles are applicable"), it had come to a fork in the road of First Amendment law. Among the universe of compelled association claims, mandatory union dues, integrated bar fees and like exactions to support **one organization**, imposed with the imprimatur of government to serve important but narrow policy ends, take courts down one analytical path. *Abood*, 431 U.S. 209; *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990); *Lehnert*, 500 U.S. 507. Courts are obligated to protect dissenting members, who are already lending involuntary, direct support to expression by the group for collective bargaining or other essential purposes, from being compelled to support partisan speech not remotely germane to the limited bases for government approval of a mandatory fee.

But when, as here, a plaintiff challenges as "compelled association" contributions to the funding of a **limited public forum** that is conceded to be viewpoint-neutral in operation, courts must depart from the standards in *Abood* and its progeny and take a different analytical road. The proper analysis must protect the ability of the forum to operate in a vital and nondiscriminatory manner, without regard to the "political or ideological" viewpoints of its users.

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forum for advancing the state's weighty interest in promoting a free exchange of ideas among students -- including controversial, minority and highly ideological viewpoints -- must prevail here.

A limited public forum at a university established for the very purpose of promoting diverse expression and viewpoints can be analogized to few other contexts and imposes strict limits on efforts to suppress or constrain expression. "[U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn." *Rosenberger*, 515 U.S. at 836. "The Nation's future depends upon leaders trained [at universities] through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *see also Sweezy*, 354 U.S. at 250 ("[t]he essentiality of [expressive] freedom in the community of American universities is almost self-evident"). By failing to recognize the distinct analysis appropriate to the limited public forum context before it, and by then minimizing the importance of the educational goals served by the University's fee forum, the Court of Appeals jeopardizes the vitality of all expressive fora and the education of future generations.

Nor is there any constitutional need to introduce the *Abood* or *Lehnert* precautions against unbounded, compelled speech into the public forum context. First, all members of the student community are funding a platform, not any one organization. Second, the requirement of viewpoint neutrality prevents the partisan abuse of a government-ordered fee that is a chief concern of those decisions. Likewise, any limits set by government at the outset in establishing a limited public forum serve to define what is germane to the forum's purposes and, thereafter "the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. Whereas union shops and integrated bars act outside such constitutional parameters, the University must and

concededly does abide by them.[7] Here, it is not UW that has purported to limit the fee forum or speakers to any particular kind of "educational" presentations or to restrict "ideological or political" speech or activities within the forum. Rather, the courts below imposed such a limitation, at respondents' behest, and embraced an egregious form of censorship that is antithetical to the core, vital purposes of a limited public forum for varied expressive associations at a university.

While requiring such barriers in a university setting is particularly unsettling, respondents' claim of a right to limit their forum contributions -- based solely on the content of speech that is within constitutional and forum guidelines but disagreeable to them -- threatens to undermine the foundation of all public fora and to cause havoc in their operations. Park districts can next be required to refund maintenance assessments each time the park is used for expression objectionable to some citizens. Some outraged citizens of Skokie could demand refunds of taxes used to repair the wear and tear to streets caused by Ku Klux Klan marchers, while still others could demand the same for the cost of a counter-demonstration. An assessment for new sidewalks would be refundable to each pro-choice citizen to the extent the walkways are used by abortion protesters. It is difficult to conceive how any vibrant public fora could survive under the

[7]Indeed, a claim that the limits on a limited public forum have not been fairly applied or that viewpoint discrimination is taking place within a public forum would be more conceptually akin to the complaints in *Abood/Lehnert*. The Court allowed the collection of mandatory dues regardless of dissension about speech relating to bar and union activities; it only restricted the use of fees that strayed from these established purposes.

inevitable crush of individualized exemptions on the claimed ground of compelled speech or funding.

II. The Impact Of The Decision Below Will Fall Most Heavily On *Amici* And Other Disfavored Groups, While Diminishing The Education Of All Members Of The University Community.

Campus student groups have a storied tradition of contributing in provocative ways to "the intellectual give and take of campus debate," *Healy v. James*, 408 U.S. 169, 181 (1972) (recognition of local chapter of Students for a Democratic Society), and of training young leaders for post-campus life. The notion that student expression could be too ideological or political to merit full and nondiscriminatory participation in a limited public forum set up by a public university precisely to give students experience in expressing and weighing competing ideas -- including theories of knowledge, liberty, rights, and government -- is contrary to the role of universities in our society and to the firm First Amendment protections that govern there. Left undisturbed, the impact of the decision below will fall most heavily on small, fledgling or unpopular groups like the LGBT Center -- the very groups that provoke the exchanges of viewpoint that universities cultivate for the benefit of all students.

The Court is "not free to disregard the practical realit[y]," *id.* at 183, that if student fees cannot be used to fund expressive activities with which some students disagree, student groups either will be forced to abandon expression to preserve their funding or lose funds necessary to carry out their expressive activities, or both. The disincentive to engage in "political or ideological" speech to keep funding is apparent. Further, funding decisionmakers will be tempted

not to allocate grants to such groups in the first place to preserve the size of their budget from student fee reductions, and organizational grants will shrink as students who disagree (or claim to disagree) with an unpopular group's message will withhold support.

For a group like the LGBT Center, it matters little what the group's actual activities may be; its mere existence can be said to connote a positive view of lesbian, gay, bisexual and transgender people that will be reason enough for objections by some and its defunding. *See generally Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995) (in private parade setting, "a contingent marching behind the [GLIB] organization's banner would . . . suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals. . . ."). Indeed, the Court of Appeals emphasized that such organizations *should* face lost expressive opportunities and funding under its analysis precisely because they are unpopular. App. at 38a. *Compare Crowder v. Housing Auth. of the City of Atlanta*, 990 F.2d 586, 592 (11th Cir. 1993) ("the right to free speech in a limited public forum may not be made contingent on majority approval").

First Amendment case law is replete with past efforts to silence relatively new, controversial presences on university campuses, particularly gay, lesbian and bisexual student groups. Whether these attempts have been to exclude the groups from official recognition, from physical facilities, or from funding, however, the courts have universally recognized the free speech and association rights of gay-identified groups and other minority student organizations

and have turned back censorship efforts.[8] *See, e.g., Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997); *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988). Here, once again, it is *amici* as well as other unpopular speakers -- on all sides of the political spectrum -- whose voices and First Amendment rights are truly at stake here, not respondents'. Small groups generally have few alternative resources to use as an expressive platform. The incantation that no First Amendment injury occurs as long as other avenues of speech remain open, App. 20a, is a fallacy that does not excuse closing down expressive avenues in a limited public forum that remain available to one's peers. *Healy*, 408 U.S. at 183. The winnowing away of unorthodox perspectives accomplished by the decision below is exactly what the First Amendment guards against.

III. The Decision Below Requires The University To Discriminate Against *Amici* And All Groups Engaging In Political Or Ideological Expression Because Of Viewpoint.

The decision below not only introduces a new and erroneous notion of compelled association into First Amendment jurisprudence, but also demands viewpoint discrimination by public universities or the courts that oversee them. All student groups engaging in political or ideological expression become a second tier of public forum participants, subject to discriminatory exclusion from full

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[8] While the Court of Appeals refers to the LGBT Center and other groups as "private associations," registered student organizations like LGBT must be not-for-profit and formalized, must be composed mainly of, controlled and directed by UW students, and must be related to student life on campus. App. 106a-107a.

forum access. Within this second tier, state actors are forced to withhold funding from the objected-to groups because of their viewpoint; the University may not "continue to distribute the same amount of funding to the political and ideological organizations albeit with funds in 'name' paid by non-objecting students." App. 44a.

Speech from a political or ideological perspective, like religious speech, cannot be singled out for diminished access to a limited public forum. *Rosenberger*, 515 U.S. at 831. Yet that is exactly what the Court of Appeals' remedy requires. *Rosenberger* held unconstitutional a funding-forum limitation under which "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." The Court made clear that similar efforts, as here, to de-fund -- and therefore curtail -- some or all political or ideological viewpoints on a topic also are constitutionally flawed:

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. *It is as objectionable to exclude* both a theistic and an atheistic perspective on the debate as it is to exclude *one, the other, or yet another political, economic, or social viewpoint.*

Id. (emphasis added). *See also Gohn*, 850 F.2d at 366 ("when [university] funds are made available, they must be distributed in a viewpoint-neutral manner").

The District Court's effort to distinguish "political and ideological" from primarily educational speech reveals the

inherent viewpoint discrimination in such an endeavor. The same flaws corrupt any application in the present context of a "germaneness" standard or the *Lehnert* test as interpreted by the Court of Appeals. App. 25a-43a. The District Court singled out *amicus* LGBT Center for reduced funding because of expressive efforts which, in its view, were allegedly "primarily concerned with promoting the homosexual agenda and promoting pro-homosexual political activism." App. 94a. The District Court arbitrarily determined that such speech is too political or ideological to have sufficient educational merit to warrant a mandatory fee. App. 94a-95a. The Court of Appeals engaged in similar judgments, as by concluding that the International Socialist Organization is "unlike, for example, a political science class on socialism . . . [and] only incidentally concerned with education." App. 19a, 29a.

But student learning at a university -- to formulate, express and evaluate ideas -- is hardly limited to the traditional classroom or advanced by the exclusion of competing political and ideological discourse. Fora created by student fees, like the one contested here, have long enriched the education of college students through exposure to fresh perspectives, diverse life experiences, and the opportunity to train in organizational operations and advocacy. Such opportunities can profoundly alter a student's life course. It is a dangerous premise to hold that the "intellectual give and take of campus debate," *Healy*, 408 U.S. at 181, should exclude much political and ideological expression and be limited only to those ideas that students know ahead of time that they want to hear.

CONCLUSION

This Court should grant review to restore the vitality of UW's viewpoint-neutral limited public forum and the rights of *amici* to full and nondiscriminatory participation in that forum.

Date: February 26, 1999

Respectfully submitted,

*Patricia M. Logue
Ruth E. Harlow
Lambda Legal Defense and
Education Fund, Inc.
11 E. Adams, Suite 1008
Chicago, IL 60603
(312) 663-4413

Attorneys for *Amici Curiae*

* *Counsel of Record*

(37)

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IN THE

Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, *et al.*,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

JORDAN W. LORENCE
NORTHSTAR LEGAL CENTER
P.O. Box 2074
Fairfax, VA 22031
(703) 359-8619

Counsel for Respondents

SUSAN K. ULLMAN
WISCONSIN DEPARTMENT OF JUSTICE
P.O. Box 7857
Madison, WI 53707-7857
(608) 267-2775

Counsel for Petitioners

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-1001

SCOTT H. SOUTHWORTH, *et al.*

v.

MICHAEL W. GREBE, *et al.*

RELEVANT DOCKET ENTRIES

1/2/97	Private civil case docketed.
6/4/97	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Harlington Wood, Circuit Judge Daniel A. Manion.
6/11/97	ORAL ORDER from the bench requesting the parties file supplemental briefs addressing the jurisdictional issue by 6/16/97.
7/11/97	Filed Circuit Rule 53 order PER CURIAM. DISMISSED for lack of jurisdiction. Circuit Judge William J. Bauer, Circuit Judge Harlington Wood, Circuit Judge Daniel A, Manion.
7/11/97	ORDER: Final judgment filed per C.R. 53 order. With costs
10/23/97	ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition

2/4/98 Possible successive appeal memorandum issued to Circuit Judge William J. Bauer, Circuit Judge Harlington Wood, Circuit Judge Daniel A, Manion regarding previously considered appeal no(s). 97-1001. [97-3510, 97-3548]

2/26/98 Circuit Judge William J. Bauer, Circuit Judge Harlington Wood, Circuit Judge Daniel A, Manion. have determined this appeal to be successive to previous appeal(s) which they have considered. This appeal shall be submitted to the same panel

8/10/98 Filed opinion of the court by Judge Manion. AFFIRMED in part, REVERSED in part, and VACATED in part. Circuit Judge William J. Bauer, Circuit Judge Harlington Wood, Circuit Judge Daniel A, Manion.

8/10/98 ORDER: Final judgment filed per opinion. Each party to bear its own costs.

8/24/98 Filed motion by Appellee Scott H. Southworth, et al. in 97-3510

8/31/98 Filed 30c Petition for Rehearing with Suggestion for Rehearing Enbanc by Appellant Michael W. Grebe

9/4/98 Sent clerk's copy of request to Appellee Scott H. Southworth, et al. requesting 30c of their Answer to the Petition for Rehearing with Suggestion for Rehearing Enbanc filed by the Appellants.

10/2/98 ORDER issued GRANTING motion to add party. The clerk is directed to CORRECT the docket to reflect that Jamie Fletcher and Kendra Fry have been added as appellees.

10/27/98 Opinion filed DENYING defendants Michael W. Grebe, et al. in 97-3510 and 97-3548 Petition for Rehearing with Suggestion for Rehearing en banc. Enbanc; Judges Cumings, Rovner, Diane P. Wood, and Evans voted to grant rehearing en banc. Judge Rovner dissented from the denial of rehearing en banc an filed an opinion which was joined by Judge Diane P. Wood and Evans. Judge Diane P. Wood dissented from the denial of rehearing en banc and filed an opinion which was joined by Judges Rovner and Evans.

2/2/99 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari.

4/1/99 Filed order from the Supreme Court: The petition for a writ of certiorari is GRANTED, limited to the following question: Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

96-C-0292-S

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/02/96	002	COMPLAINT; SUMMONS ISSUED
5/03/96	003	ANSWER
10/01/96	014	DEFT. RESPONSE TO PLTFS. INTERROGATORIES.
10/07/96	016	AFFIDAVIT OF SCOTT HAROLD SOUTHWORTH.
10/07/96	019	PLTFS. EXHIBITS IN SUPPORT OF MOT. FOR S/J.
10/08/96	021	DEPOSITION OF KEITH B. BANNACH, TAKEN 8/30/96.
10/08/96	022	DEPOSITION OF AMY MARIE SCHOEPKE, TAKEN 8/30/96.
10/08/96	023	DEPOSITION OF SCOTT HAROLD SOUTHWORTH, TAKEN 8/30/96.
10/08/96	024	MOTION FOR SUMMARY JUDGMENT BY DEFTS.
10/08/96	026	AFFIDAVIT OF SUSNA K. ULLMAN.

DATE	NR.	PROCEEDINGS
10/10/96	028	MOTION FOR SUMMARY JUDGMENT BY PLTFS.
10/10/96	029	BRIEF IN SUPPORT PF PLTFS. MOT. FOR S/J.
10/28/96	033	RESPONSE TO S/J FINDINGS/CONCL. BY DEFTS.
10/28/96	034	AFFIDAVIT OF SUSAN K. ULLMAN.
10/28/96	035	AFFIDAVIT OF ROGER HOWARD.
10/28/96	036	AFFIDAVIT OF LAUREN ONKELES.
10/28/96	037	AFFIDAVIT OF JOHN PECK.
10/28/96	038	AFFIDAVIT OF KERRY SCHUMAN.
10/28/96	039	AFFIDAVIT OF JESSICA BRUSKY.
10/30/96	042	BRIEF IN REPLY IN SUPPORT OF PLTF. MOTION FOR S/J.
11/07/96	046	AFFIDAVIT OF JORDAN W. LORENCE.
11/07/96	047	AFFIDAVIT OF SCOTT HAROLD SOUTHWORTH (2ND).
11/12/96	050	JOINT FINAL PRETRIAL REPORT.

DATE	NR.	PROCEEDINGS
11/29/96	052	ORDER GRANTING PLTFS. MOT/SJ; DENYING DEFTS. MOT/SJ; FIRST AMEND. VIOLATED BY MANDATORY SEGREGATED FEE POLICY.
11/29/96	053	JUDGMENT ENTERED DECLARING MANDATORY SEGREGATED FEE POLICY VIOLATES FIRST AMENDMENT TO U.S. CONSTITUTION (JCS/JWS) CCMLD
12/02/96	054	JUDGMENT - AMENDED W/COSTS TO PLTFS. (JCS/JWS) CC MLD.
12/30/96	057	NOTICE OF APPEAL BY DEFTS. FEE PD, DS FILED, SR SENT CC; PARTIES (97-1001)
12/31/96	058	STIPULATION AND ORDER FOR STAY OF JUDGMENT. CC MLD.
7/24/97	059	ORDER OF INJUNCTIVE RELIEF; DMSG. AS MOOT PLTFS CLAIMS OTHER THAN FIRST AMENDMENT SPEECH AND ASSOCIATION CLAIMS.
8/04/97	061	PLTFS. SUGGESTED CHANGES IN COURT ORDER OF 7/23/97.

DATE	NR.	PROCEEDINGS
8/06/97	066	ORDER FROM USCA THAT APPEAL IS DISMISSED W/COSTS. (97-1001) RECORD NOT RETURNED
8/15/97	068	BRIEF IN OPPOSITION BY DEFTS. TO THE PROPOSED INJUNCTION ORDER OF THE COURT.
9/03/97	070	ORDER GRANTING PLTFS. MOT. FOR PARTIAL DMSL; DENYING PLTFS. MOY/RECONSIDER; DECLARATORY JUDGT. TO BE ENTERED. CC MLD.
9/03/97	071 –	JUDGMENT DECLARING USE OF MANDATORY FEES BY DEFTS. TO BE IN VIOLA. OF FIRST AMENDMENT W/COSTS TO PLTFS. (JCS/JWS) CC MLD.
9/16/97	072	STIPULATION AND ORDER FOR STAY OF INJUNCTION. CC MLD.
10/02/97	073	NOTICE OF APPEAL BY DEFTS. FEE PD, DS FILED, SR SENT CC; PARTIES
10/06/97	074	NOTICE OF APPEAL BY PLTF. FEE PD, NO DC FILED, SR SENT CC; PARTIES

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE and KEITH BANNACH,
Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR;
JONATHAN B. BARRY; JOHN T. BENSON;
BRIGIT E. BROWN; JOHN BUDZINSKI;
ALFRED S. DE SIMONE; LEE S. DREYFUS;
DANIEL C. GELATT; KATHLEEN J. HEMPEL;
RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH;
VIRGINIA R. MACNEIL; SAN W. ORR, JR.;
GERARD A. RANDALL, JR.; JAY L. SMITH and
GEORGE K. STEIL, SR., all in their official
capacities as members of the Board of Regents
of the University of Wisconsin System,
Defendants.

JOINT FINAL PRE-TRIAL REPORT

(a) *Date of the pretrial conference and appearances for the parties:*

November 14, 1996 at 1:00 p.m.

Appearance for plaintiffs: Jordan Lorence
Box 2074
Fairfax, VA 22031
(703) 359-8619

Appearance for defendants: Susan K. Ullman
Peter C. Anderson
Assistant Attorneys General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin
53707-7857
(608) 267-2775

(b) *Agreed statement of all uncontested facts*

(The following numbers 1–25 are stipulations of fact the parties previously agreed to).

1. Students enrolled fulltime at the University of Wisconsin–Madison must pay a mandatory fee each semester. This fee is called the segregated university fee or the segregated fee. The segregated fee money collected from the students is deposited in state accounts.

2. Wisconsin Statute §36.09 gives both the Board of Regents and the students control over the funds generated by the segregated fee. This is sometimes called "shared governance." Wisconsin Statute §36.09(5) states:

> STUDENTS. The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the immediate governance of and policy development for such institutions. As such, students shall have the primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the Board of Regents shall have the responsibility for

the deposition of those student fees which constitute substantial support for campus activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

3. The Associated Students of Madison (ASM) exists as the student association entitled to represent students on campus. The Student Services Finance Committee (SSFC) exists as part of the ASM (student government) to review internal ASM budgets and external university budgets that are funded by the segregated fee.

4. The Board of Regents has divided the expenditures of the segregated fee into two main categories, with several subdivisions under each of the two categories. The two main subdivisions are *allocable* fees and *nonallocable* fees.

5. Full-time students attending the University of Wisconsin-Madison during the first semester 1995-96 school year were required to pay the segregated fee of $165.75 for the first semester. During the second semester, full-time students paid again the segregated fee of $165.75, for a total of $331.50 ($330.00 in segregated fees, and $1.50 to the United Council). The University distributed each student's segregated each semester during the 95-96 school year as follows:

Health (nonallocable): $79.34 — The University Health Service portion of the segregated fee supports the clinical medicine, health education and public health missions of the student health service.

Union (allocable and nonallocable): 46.51 — this portion of the segregated fee supports the facilities and programs of

the Wisconsin Union. This involves the Memorial Union and Union South and extensive social and cultural programming.

GSSF (allocable): $13.42 — General Student Services Fund (GSSF) provides support for an array of services for students and student organizations at UW-Madison. Examples include the GUTS Tutorial, the Student Tenant Union, the Community Law Office, Campus Women's Center, SAFEride bus, WLHA Student Radio, the UW-Greens, the Lesbian Gay Bisexual Center, WISPIRG, Madison AIDS Support Network, Rape Crisis Center, Men Stopping Rape and Vets for Vets.

System Audit Liability Fee (nonallocable): $8.20 — Pursuant to a Legislative Audit Bureau review, the 1985-87 State of Wisconsin Biennial Budget allocated auxiliary reserve balances from other UW System campuses to the benefit of the UW-Madison. Repayment is taking place over a period of ten years through funding from this segregated fee.

Intramural (allocable and nonallocable): $7.78 — this portion of the fee provides funding for the programs and facilities operated under the Division of Recreational Sports General Programs budget. Major facilities supported in this budget include the Southeast Recreational Facilities (SERF) and the Natatorium.

CCTAP (allocable): $4.76 — The Child Care Tuition Assistance Program (CCTAP) portion of the segregated fee provides tuition grants to students with children to pay for child care costs.

Student Government Activity (allocable): $4.28 — The Associated Students of Madison (ASM) portion of the segregated fee supports the operation of the UW-Madison student government association and other student group funding that is distributed by the ASM.

United Council (allocable): .75 — This fee supports representation activities by the United Council of Student Governments of UW system institutions. Although strictly not a segregated fee, it is assessed with the segregated fee group but at a flat rate of .75 per student without regard to credit load.

WISPIRG (allocable): .71 — WISPIRG is a student group activity involved in a variety of public policy issues and supported by a portion of the segregated fee.

6. During the first semester of the 1996–97 school year, each full-time student paid a segregated fee of $190.45 for the first semester. It was distributed as follows:

Health (nonallocable): $85.39

Union (nonallocable): 48.64

Bus Pass (allocable) - 20.08 — This is a new category for the 96–97 school year. During the spring, 1996 election, students approved a referendum to charge each student $20.08 for a pass giving free use on all non-campus Madison Metro Transit System bus routes.

GSSF (allocable): $6.48 — General Student Services Fund (GSSF).

System Audit Liability Fee (nonallocable): $8.12

Intramural (allocable and nonallocable): $10.89

CCTAP (allocable): $4.56 — Child Care Tuition Assistance Program.

Student Government Activity (allocable): $4.63

United Council (allocable): .95

WISPIRG (allocable): .71

7. Students, acting through the Student Services Finance Committee (SSFC) (a committee that is part of the Associated Students of Madison) are able to review the budgets of the units within the nonallocable category. SSFC may make recommendations, reject the budget or vote to increase the budget. However, the Chancellor has ultimate authority over these units and a SSFC vote is not necessarily binding on him.

8. In January and February, 1997, the SSFC will review the proposed budgets by entities that receive their funding from nonallocable fee sources. The Associated Students of Madison (student government) may make recommendations to the Chancellor and the Board of Regents, but the students do not exercise control over the budgets for groups funded from the nonallocable category.

9. Items funded through the *nonallocable* category include:

- Debt service
- fixed operating costs of auxiliary operations,
- required reserves
- student health services
- Wisconsin Union
- the first and second year of the Recreational Sports Budget
- University Health Services

10. The Board of Regents has determined that student responsibility for the direct disposition of student fees exist only for the *allocable* portion of the segregated fee. Under sec. 36.09 (5), Wis. Stats., students have primary responsibility for the formulation and review of policies concerning "student life, services and interests." At

UW-Madison, the chancellor has agreed that "student life, services and interests" include:

a) The registration and regulation of student organizations;

b) Non-academic social, cultural and recreational programs for students; and

c) Those services that are initiated and operated by students.

11. On the Madison campus, the *allocable* fee category includes the following:

- General Student Service Fund (GSSF)
- Child Care Tuition Assistance Program (CCTAP)
- Wisconsin Union Directorate Distinguished Lectures Series
- the third year of the Recreational Sports budget
- the Associated Students of Madison budget
- WISPIRG (Wisconsin Public Interest Research Group)
- United Council

12. The Associated Students of Madison (ASM) has complete authority over most of the allocable funding, in conjunction with the Student Services Finance Committee (SSFC). In addition, some allocable funding is approved via student referendum. All students are permitted to participate in the process of reviewing and approving allocations by running for election to ASM or SSFC, as well as attending and participating in ASM and SSFC meetings where allocation determinations are discussed. The process for reviewing and

approving allocations for funding is administered in a viewpoint-neutral fashion.

13. Some student organizations that receive funding from the segregated fee receive their funding from the category of the allocable fee called the General Student Services Fund (GSSF). The student groups apply for funding to the Student Services Finance Committee (SSFC). The General Student Services Fund provides a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students. GSSF funds should also contribute significantly to student health, safety or academic success.

14. Applications to the GSSF are open to all registered student organizations, university departments or community based services. Student government activity grants are available only to Registered Student Organizations. To be eligible to register as a Registered Student Organization, a student group must meet the following criteria:

- it must be a not-for-profit, formalized group.
- it must be composed mainly of students.
- it must be controlled and directed by students.
- it must be related to student life on campus.
- it must abide by all federal, state, city and University nondiscrimination laws and policies.
- it must identify a student as a primary contact person for the organization and provide the Student Organization Office with the information required on the registration form.
- it must abide by the financial and other regulations specified in the Student Organization Handbook.

15. Registered Student Organizations can seek funding from the segregated fee in several ways:

- seek funding via a student referendum.
- seek GSSF (General Student Services Fund) funding through the Student Services Finance Committee (SSFC).
- seek Student Government Activity funding through the Associated Students of Madison (ASM).

16. Registered Student Organizations may seek funding through a student referendum. The students vote at an election on whether to approve the assessment for the student group or not.

17. Registered Student Organizations can also apply for GSSF funding from the Student Services Finance Committee (SSFC) for funding from the segregated student fee. If a student organization receives GSSF funds, it may not receive an ASM Operations Grant at the same time. However, it may receive an ASM Events Grant while receiving GSSF funds. During the 95-96 school year, the SSFC distributed $974,200.00 in GSSF funding from the segregated fee to the following organizations:

Student Services Finance Committee (Admin.)	8,400.00
Student Services Finance Committee (unallocated)	11,051.00
SAFEride	165,000.00
Community Law Office	10,435.00
UW Greens	6,905.00
GUTS	56,342.00
Madison AIDS Support Network	26,070.00
Men Stopping Rape	20,136.00

Lesbian, Gay & Bisexual Center	22,042.00
Radio Station	481,673.00
Rape Crisis Center	27,101.00
Student Leadership Program (SLP)	12,815.00
Adventure Learning Program (ALP)	13,050.00
Student Tenant Union	33,340.00
U.S.S.A.	38,000.00
Vets for Vets	7,640.00
Campus Women's Center	34,200.00
Total	974,200.00

Student organizations seeking funding through this method must apply for funding to begin the next fiscal year.

18. Most Registered Student Organizations seek funding from the Student Government Activity Fund through the Associated Students of Madison (ASM). These funds come from the segregated fee. These student groups can apply for *Operations Grants*, *Event Grants*, or *Travel Grants*.

Operations Grants - Registered Student Organizations seeking an Operations Grant must apply to the ASM by March for funding in the next school year. New student organizations or groups that did not apply for funding the previous spring may apply for a Last Minute Operations Grant, which is limited to a maximum of $250.00. During the 95-96 school year, ASM awarded 81 operations grants for a total of $30,902.00, ranging from $100.00 to $863.00, with the average grant being $382.00. During the 95-96 school year, the ASM awarded 39 Last Minute Operations Grants totaling 3, 954.00, ranging from $40.00 to $175.00, for an average of $101.00.

Event Grants - Registered Student Organizations may apply for funding of a specific event. These events must be in the Madison area and open to all students. During the

95–96 school year, the event grants ranged from $150.00 to $7,000.00, with the average event grant being $1279.00. During the 95–96 school year, the ASM approved 57 event grants for a total amount of $72,893.00.

Travel Grants – Registered Student Organizations may apply for funding of travel that is central to the purpose of the organization. During the 95–96 school year, travel grants ranged from $150 to $400, with the average travel grant being $255. During the 95–96 school year, the ASM approved six travel grants totaling $1528.00.

19. The total amount of money from the Student Government Activity Fund that the ASM distributed during 95–96 school year for operations grants, last minute operations grants, event grants and travel grants is $109,277.00.

20. After the ASM and the SSFC have approved the disbursements of allocable money, their decisions are sent to the Chancellor and the Board of Regents for their review and approval.

21. Student organizations receiving funding do not get cash or a lump sum payment from the ASM. The organizations must submit a requisition form for something specific. An employee of the Office of Dean of Students working with ASM orders the disbursement of the money. Except for membership fees paid in lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the organization itself to pay its bills. Employees of organizations receiving allocations receive their salaries or stipends via the university payroll system.

22. The SSFC can freeze the funding of a student group at anytime.

23. Under Wisconsin Statute §36.09(5), the Board of Regents has final authority to approve or disapprove the allocations of funds by the student government.

24. Registered Student Organizations can reserve University facilities for meetings and events. Nonacademic space in the Memorial Union, Union South and in most other campus buildings, including recreational, athletic and outdoor campus areas can be reserved for meetings by Registered Student Organizations.

25. The following documents are attached to this stipulation. They are true and correct copies and may be admitted into evidence:

a. Full-Time Segregated Fee Dollar Distributions, First Semester 1995–96

b. Full-Time Segregated Fee Dollar Distributions, First Semester 1996–97

c. 1995–96 Associated Students of Madison Grant Allocations

d. University of Wisconsin System Segregated Fee Allocations by Institution — Fiscal Year 1995–96, University of Wisconsin–Madison.

e. The Student Services Finance Committee current policy statement

f. University of Wisconsin–Madison Allocable/Non-Allocable Segregated Fee Distribution 1995–96 Annual Budget

g. The University of Wisconsin System Financial Policy and Procedure Paper Number 20–Rev (3), dated June 8, 1987.

h. Student Organization Handbook 1996–97 — Student Organization Office, University of Wisconsin–Madison, Dean of Students Office.

i. Student Services Finance Committee — student organization application for 1996–97 GSSF funding.

26. The three plaintiffs are all law students enrolled at the University of Wisconsin–Madison's law school. Scott Southworth and Keith Bannach are third year students, and expect to graduate in May 1997. Amy Schoepke is a second year student, who expects to graduate from law school in May 1998.

27. All three of the law students describe their political philosophy as conservative and all three consider themselves Republicans. All three are Christians and believe that the Bible is the Word of God and they are to live their lives according to its teachings.

28. Because of their political, ideological and religious views, the three plaintiffs believe and hold to the following beliefs:

29. They oppose legalized abortion. They believe that God created sex to be engaged in only within the institution of marriage, and define marriage to be one man and one woman. Therefore, they oppose sex outside of marriage and homosexual conduct. They oppose efforts to promote abortion, and statements that homosexuality is normal and should be protected under law.

30. The three plaintiffs support the American free enterprise system and oppose socialism and expansive governmental regulation of involvement in the economy. They oppose unnecessary governmental protection of the

environment that costs jobs and denies people of their property rights.

31. The three plaintiffs consider themselves Republicans, and generally support the views of the Republican Party. They support the Contract with America. They also generally support the policies of Governor Tommy Thompson and his budget priorities.

32. The plaintiffs also support Governor Tommy Thompson's efforts to expand U.S. Highway 12 from two lanes to four lanes. One of the plaintiffs, Scott Harold Southworth, drives frequently on U.S. Highway 12. He thinks the current two lane road is unsafe, and needs to be widened to four lanes.

33. The three plaintiffs believe that all students have the right to express their opinion at the University by distributing literature on campus, renting rooms at the University for speakers advocating their viewpoints, lobbying the Wisconsin Legislature and the Congress, supporting and opposing political candidates, conducting protest marches, etc.

34. The plaintiffs disagree and agree with some of the views expressed by student groups receiving funding through the mandatory fee. The plaintiffs also believe that no student should be compelled by the University to fund the advocacy of student groups as a requirement in order to attend the University, receive their grades and to graduate from there.

35. WISPIRG, the UW Greens and others sponsored Earth Week 1995. Events included:

April 19, 7:30 p.m. – discussion on Ecofeminism

April 21, 11:30 a.m. – Wisconsin Earth Day March: Compost the Governor's Budget.

April 22, 5:00 p.m. – Progressive Politics, discussion with the Madison Institute

May 1, 12 noon – May Day Mobilization for a People's Budget – rally at the State Capitol.

36. WISPIRG conducts an internship program in which students have worked to promote the federal Right to Know Act (dealing with toxic chemicals); campaign spending reform, reauthorization of the Endangered Species Act and work to oppose Exxon's Crandon Min.

37. The Lesbian, Gay, Bisexual Campus Center received $22,042.00 from the segregated fee during the 1995-96 school year. It provides "direct social and support services to the LGB Community, provide educational services for the larger campus community and advocate for gay-positive University policies." The Center "advocates for the civil rights of lesbians, gays and bisexuals. We work with the University administration to make our campus a gay-friendly environment."

38. The Lesbian, Gay, Bisexual Center offers panel discussions on homosexuality, brown bag lunches and dinners, speakers for classes, media interviews, etc. The Center also offers support groups for people who think they are homosexuals and for people who are "coming out" as homosexuals.

39. The Lesbian, Gay, Bisexual Center received additional funding in the form of an ASM event grant of $1,000.00 from the segregated fee to sponsor a speech by Leslea Newman, entitled, "Heather's Mommy Speaks Out" and a reading about lesbian identity and AIDS. Her speech would concern "how homophobia is perpetuated in our society and affects us all" and "how AIDS in general has affected the

queer community." The Campus Women's Center and the Ten Percent Society also sponsored this speech.

40. In its December 1995 newsletter, entitled, "Queer Campus News," the Lesbian Gay Bisexual Center printed an article informing its readers about pro-gay religious organizations, such as "Coming Out, Coming Together," which is "an interfaith organization of faith communities that are supportive of gay, lesbian, bisexual, and transgender persons." The newsletter said this group promotes pro-homosexual worship services and said that the group's activities might include "attending events where homosexuality is being challenged on religious grounds . . ."

41. In its December 1995 newsletter, entitled, "Queer Campus News," the Lesbian Gay Bisexual Center printed an article informing its readers about "Integrity/Dignity," which is "a gathering of gay, lesbian, bisexual and transgendered Catholics and Episcopalians." This is a religious support group. "The group meets twice a month for liturgy to fulfill the spiritual needs that we all have, often because our home parishes and churches do not meet these needs."

42. In its December 1995 newsletter, entitled, "Queer Campus News," the Lesbian Gay Bisexual Center printed an article on "Action Wisconsin," which claims to be the "only statewide GLBT [gay, lesbian, bisexual and transgender] political organization." The article urges people to "get involved in the political ACTION agenda" and to "[b]e a part of Wisconsin's GLBT power." The group's political agenda includes "family recognition, HIV issues, youth issues, fighting the radical right, and protection and expansion of GLBT civil/legal rights." Also, the article says that "[v]isible, effective participation in the 1996 election season is our top ACTION priority now."

43. In its December 1995 newsletter, entitled, "Queer Campus News," the Lesbian Gay Bisexual Center printed an article that praised Maine voters for defeating a ballot measure that would have prohibited the state from adding "sexual orientation" to the protected classes under its antidiscrimination law

44. The Campus Women's Center received $34,200.00 from the segregated fee during the 1995-96 school year. The Campus Women's Center was created in 1983 "as a student organization committed to empowering women in order to strengthen the entire community. The purpose of our work is to provide a variety of women centered support services, to educate the campus on a number of women's issues, and to serve as a resource and referral center for all students." The Center offers resources, films, concerts, lectures, support services, sexual assault awareness and a bi-monthly newsletter.

45. The Campus Women's Center co-sponsored an art exhibit at the Wisconsin Union called, "Wake Up Little Susie: Pregnancy and Power Before *Roe v. Wade*" and another exhibit called, "Warnings." The exhibits were also funded by an ASM Event Grant of $1160.00. "Wake Up Little Susie" addresses unwanted pregnancy by white and black women in pre-*Roe* America. The application includes a review of these two exhibits called "Grid of Choice" by Ann Elliott Sherman. She described the *Warnings* exhibit this way:

> The accompanying exhibit of computer-montage posters by Lisa Link, *Warnings*, is the work of a Jewish feminist enraged by anti-choice propaganda, equating abortion with the Holocaust and abortion-rights activists with Nazis. As her own corrective, Link embarked upon two years of research and dug up Third Reich pamphlets, posters, speeches and

> writings that she graphically juxtaposes with modern-day expressions of the conservative, anti-choice persuasions.
>
> The comparison of Randall Terry of Operation Rescue with Adolf Hitler or Joseph Goebbels may offend some, but the parallels in their messages are hard to refute. And the show is not without touches of humor — the mock Western movie poster portraying Supreme Court Justice Rehnquist and O'Connor as gunslingers shooting down reproductive rights is hilarious. Link's work is viscerally effective and direct, in the tradition of political poster art, taking no prisoners and mincing no words.

46. The Campus Women's Center was also a sponsor of the "Third Annual Gay and Lesbian Film Festival," along with the Gay, Lesbian and Bisexual Campus Center and the Ten Percent Society (which are also groups receiving funding from the segregated fee). This film festival, which occurred on April 18 and April 25, 1996, included a number of pro-homosexual movies.

47. The Campus Women's Center also cosponsored the speech on lesbianism by Leslea Newman along with the Lesbian Gay Bisexual Center and the Ten Percent Society.

48. During the Spring 1996 semester, the Campus Women's Center offered six women's support groups. Two concerned eating disorders, one was named, "Beyond Depression," two were on female empowerment and maintaining healthy relationships. The last was a "Bisexual Women's Discussion Group," with discussions on similarities and differences between bisexual and lesbian women, and opinions of bisexuality within the LGB community."

49. The UW Greens received $6,905.00 from the segregated fee during the 1995–96 school year. The group formed at Madison in 1988 as an outgrowth of the West German Greens movement. The UW Greens describe themselves as part of a movement that "provides an opportunity for the merger of spiritual, community and alternative institutions. This synthesis, in combination with political action, will ultimately lead to the changes which are necessary in society if we are to maintain the earth and its inhabitants."

50. During the 1995–96 Session of the Wisconsin Assembly, a legislator contacted the UW Greens and other organizations and asked if they would allow their names to be placed on three bills. The UW Greens agreed to have their name listed as a group desiring Assembly Bill 336 (eliminating the exemption for mining activities from the Department of Natural Resource's duty to set standards for harmful substances in groundwater); Assembly Bill 338 (relating to exemptions from rules regulating mining and regulating the storage and disposal of mining waste) and Assembly Bill 339 (concerning mining on state-owned land).

51. The UW Greens staged a march to the State Capitol during Earth Week, 1995, to protest Governor Thompson's budget, by composing his budget., to show their opposition to it. The UW Greens have also urged people to oppose development of the Crandon Mine in Forest County, Wisconsin, opposed the use of Bovine Growth Hormone in milk and dairy products, urged people to boycott Shell Oil and embargo Nigerian exports because of Nigeria's alleged environmental and human rights abuses, and to oppose "Structural Adjustment Programs" imposed by the World Bank on poor Third World nations that the UW Greens say rob their people "of health, education, and life itself."

52. During the 1995–96 school year, the International Socialist Organization received an ASM operations grant from the segregated fee of $350.00. The International Socialist Organization promotes socialism through debates, rallies, conferences, etc. The organization had a web page on the Internet during the 1995–96 school year in which it espoused its various ideas:

> Although workers create society's wealth, they have no control over its production and distribution. A socialist society can only be built when workers collectively seize control of that wealth and democratically plan its production and distribution according to human needs instead of profit....
>
> Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown.
>
> The structures of their present government — parliaments, the army, the police and the judiciary — cannot be taken over and used by the working class. They grew up under capitalism and are designed to protect the ruling class against workers....
>
> The working class needs an entirely different kind of state — a worker's state based on councils of workers' delegates and a workers' militia.

53. The International Socialist Organization opposes the Republicans' Contract on America, supports affirmative action, and opposes racism, sexism and homophobia.

54. During the 1995–96 school year, the Ten Percent Society received an ASM operations grant of $550.00. The Ten Percent Society is a pro-homosexual group which works "to ensure that LGB's [lesbians, gays and bisexuals] have a

study environment free of homophobia and harassment. We envision a day when all barriers between LGB's and straight people have fallen and we can all be ourselves without fear of verbal or physical abuse."

55. The Ten Percent Society stated in its application for ASM funding that it has "also been active in the political arena as necessary. In the past we have struggled against homophobia in the military and on campus, we have held candidate forums for student areas, and we have gone head to head with the administration as is becoming necessary again. In the future we will continue are [sic, "our"] newly begun attempt to get domestic partner insurance by networking with as many students as are willing."

56. The Ten Percent Society presented an "Out and About" conference in April 1996, described as its "annual spring LGBT [lesbian, gay, bisexual, transgender] awareness series of noted speakers, entertainers and films." This event included brown bag discussions and lectures, such as State Rep. Tammy Baldwin, "Wisconsin's only openly gay state legislator" who fights "for the rights of same-sex couple[s] to marry in the state of Wisconsin".

57. During the 1995-96 school year, the Progressive Student Network received an ASM operations grant of $590.00. This activist group "focuses on a wide variety of current issues including military/biotech research on campus, ROTC discrimination against queers, racist mascots in sports, the crisis of hunger and homelessness, free trade (NAFTA/GATT), welfare reform, political prisoners and prison organizing, environmental racism, ecofeminism and women's empowerment, rightwing backlash on campus, the GOP 'Contract on America,' etc.... We also publish our popular 'UW Disorientation Manual.'"

58. The Progressive Student Network distributes its Disorientation Manual at the UW-Madison campus. The back page of the Disorientation Manual states that it is "funded by the Associated Students of Madison. The ASM does not necessarily endorse this organization or its beliefs."

59. The Disorientation Manual has a scoffing, anti-authority point of view ("fart in the face of authority"). The Manual criticizes and mocks the Board of Regents and Governor Tommy Thompson for the way they spend money on campus. The Disorientation Manual promotes its views of multiculturalism with statements such as "Fuck White Supremacy." It also promotes homosexuality:

> Congratulations! You've stepped out of whatever homohating hometown you probably "grew up" in and have come to the only Midwestern mecca where gay rights exist, bisexuals can flirt shamelessly, and our family is so comfortable that we can even afford that sociopolitical luxury of infighting.
>
> Of course, isn't it odd that the military Reserve Officer Training Corps (ROTC) openly discriminates against homosexuals but is still allowed on campus (despite UW policy). Also, spouses of UW students get UW health benefits, while legally-sanctioned "domestic partners" (the only way for homosexuals to marry in WI) of UW students don't.

60. During the 1995-96 school year, Amnesty International received an ASM Operations Grant of $625.00 and a Travel Grant of $330.00, both of which come from the segregated free. Amnesty International works for human right in nations around the world. Amnesty International opposes the death penalty. Therefore, if a nation executes any criminals for any reason, including conviction of murder

under sufficient due process, Amnesty International will characterize that nation as violating the human rights of its citizens.

61. Community Action on Latin America (CALA) received an ASM operations grant of $450.00 during the 1995-96 school year. In its application for funding, the organization described its purposes and political activism this way:

> CALA has been a campus and community organization at UW since the early 1970's. Our group focuses on Latin America — current issues, historical underpinnings, and USA policy towards the region. We are an activist group that meets regularly with our congressional representatives, sponsors educational initiatives on campus and hosts speakers and cultural events. Our mission is to encourage student and community dialogue and action with regard to Latin American issues.

62. CALA has sponsored speeches by a labor organizer from Guatemala, another event by a union official from Nicaragua and a third presentation by labor organizers from El Salvador.

63. La Colectiva Cultural de Aztlán received an ASM operations grant of $665.00 from the segregated fee and a travel grant of $250.00 during the 1995-96 school year. In a request for an ASM operations travel grant, La Colectiva defined itself this way, and explained its political activism:

> La Colectiva Cultural de Aztlán was created in 1988 as a support groups for Chicano/a undergraduate students at UW-Madison. We are involved in many different areas of college life. These areas include: a culture [sic], political, recruitment, and social.

> Politically, we have to fight for what we want. Due to student leadership and pressure, the existing Chicano Studies Program was established in the 1970's. We also support other off-campus political groups, such as Centro Hispano of Dane County and the United Farmworkers of America.

64. La Colectiva also received an additional $727.00 in the form of an ASM event grant from the segregated fee for a performance of a play called, "Hispanics for Wilson: The New Agenda." The application for the event grant explained that the play "is a satirical look at Proposition 187 and California Pete Wilson's '96 presidential bid." The application states that the performance will "educate the university community on the complexities and consequences of legislation such as Prop. 187 and English Only laws." La Colectiva said the visit by Hispanics for Wilson "will educate the UW-Madison community on the revolutionary spirit and resistant aspects of Chicano culture and politics."

65. During the 1995-96 school year, the Student Labor Action Coalition received an ASM operations grant of $265.00. The group is a pro-labor group that described its activities this way in its grant application:

> We have held forums which brought professors, students and labor activists to present their ideas to the student body. We have presented information on labor events at tables in Memorial Union and in the dorms. We have gathered signatures on petitions on issues of concern to students and workers, showed videos of various events involving working people, held demonstrations to raise awareness and raised funds to pursue these goals. We have also traveled to places like Decatur, IL where working people are

boldly taking stands for safe working conditions and fair contracts."

66. The Student Labor Action Coalition also received an ASM event grant of $2,000.00 (along with UW Greens, Student Solidarity, the New Progressive Party and others) for a conference entitled, "Youth in Action: Building for a Sustainable Society." The event, held October 6–8, 1995 had these three goals:

1. To educate students and youth on labor, education, environment an democracy issues;

2. To encourage the development of chapters of youth groups who are actively committed to a vision of a just and sustainable society;

3. To build a network of Midwestern progressive groups to coordinate activities.

The conference included "issue-oriented classes" in "global trade, trends in family farming, immigration, the labor movement, developing a sustainable economy, [and] affirmative action."

67. During the 1995–96 school year, Student Solidarity received an ASM operations grant of $210.00. Student Solidarity wants to educate the University community about "progressive ideas for social change and to participate in implementing some of those ideas," and also educate students about the "value of a democratically organized labor movement in the contemporary U.S." Student Solidarity was one of the co-sponsors of the conference called "Youth in Action: Building for a Sustainable Society." That conference, funded by segregated fees, is described more fully under the heading of "Student Labor Action Coalition."

68. During the 1995–96 school year, Student NOW received an ASM operations grant of $300.00. This group is a student adjunct to the prominent feminist organization, the National Organization for Women. Student NOW defines its purpose this way:

> Our organization serves the purpose of educating the UW–Campus about women's rights and gender issues and empowering students with skills and strategies to affect change in our community.
>
> We believe that all women regardless of race, class, sexual orientation, physical ability and ethnicity should be free from gender discrimination in our society. Our goals are to increase the awareness of students on issues such as violence against women, sexual harassment, wage discrimination, racism, and homophobia and provide opportunities to join together to fight these injustices.

69. During the 1995–96 school year, MADPAC received an ASM operations grant from the segregated fee of $100.00. In its application for funding, MADPAC described its political activism this way:

> Our organization seeks to engage students in political action and provide a forum for discussion based on an interest in Israel and the regional peace process. To accomplish this goal, the organization provides its members with current information and materials, and guest speakers. We hope to stimulate a greater awareness and understanding of these issues among the campus community.

70. During the 1995–96 school year, Madison Treaty Rights Support Group received an ASM operations grant from the segregated fee of $435.00. This group works "to organize

the non-Indian community in support of Native American rights." The group's two goals are:

> 1) To increase awareness and understanding of Native American issues (such as mining, religious freedom, and harvesting rights) by educating students and the larger Madison community on current issues.
>
> 2) To take social and political action on these issues through rallies, vigils, letter writing campaigns, etc.

71. The Madison Treaty Rights Support Group distributed a brochure describing its lobbying on political matters:

> In Madison, we have a special responsibility to influence state government. We have worked with the HONOR network to get Indian curriculum into the public schools and to counter racist acts by company and government officials. We have worked with the Wisconsin 1992 Alliance to stop the renaming of a local road as Columbus Highway and to reform the state Quincentennial Committee. We have also distributed information on mining to legislators and the state media.

72. All materials printed with ASM funds must contain a disclaimer that the funded organization's views are not those of the ASM.

73. The Associated Students of Madison Bylaws require all events funded events grants to be open to the entire student body.

74. Defendants are all members of the Board of Regents of the University of Wisconsin System and are being sued in their official capacity. (Complaint ¶ 5).

75. Plaintiffs claim that the policy and practice of the Board of Regents of the University of Wisconsin System to fund political and ideological groups through a mandatory student fee violate plaintiffs' rights to freedom of speech, freedom of association, free exercise of religion, and their rights under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb and 1983 (Complaint at 6–7).

76. Plaintiffs allege that defendants lack a compelling interest to justify an infringement on students' freedom of speech rights, their rights not to associate with specific people, their rights under the Free Exercise Clause of the First Amendment, or their rights under the Religious Freedom Restoration Act (Complaint ¶s 11, 15).

77. Plaintiffs' complaint challenges the policy of the Board of Regents of the University of the Wisconsin System, rather than the process whereby the student government decides how much money to allocate to a given organization (Complaint ¶s 1, 7, 10, 15).

78. Plaintiff Bannach testified that he primarily objected to the following student groups receiving money from the segregated student fee: WISPIRG; Lesbian, Gay, Bisexual Campus Center; the Campus Women's Center and UW Greens (Bannach depo. at 27).

79. Plaintiff Bannach testified that the religious beliefs he holds which are violated by student groups receiving money from his payment of the segregated student fee are his belief in the sanctity of life, the belief in an all-powerful and living God, and the belief that homosexuality is a destructive lifestyle which is sinful in nature. Plaintiff Bannach also

testified that the University's advocacy of pushing premarital sex violates his disagreement with premarital sex. (Bannach depo. at 73). Plaintiff Bannach testified that he objected to the Women's Center because of its "pro-abortion push" (*id.* at 42). He identified the Lesbian, Gay, Bisexual Campus Center as ardently and repeatedly promoting the idea that the gay and lesbian lifestyle is an acceptable lifestyle (*id.* at 51–52).

80. Plaintiff Schoepke testified she objects to the use of a portion of the segregated student fee to fund the following student groups: WISPIRG; UW Greens; the Campus Women's Center; the Lesbian, Gay, Bisexual Campus Center; and the International Socialist Organization. (Schoepke depo. at 4, 18, 25). She testified that she is a Christian, and that as such she opposes the Lesbian, Gay, Bisexual Campus Center because it has organized itself around an activity which she considers sinful (*id.* at 8).

81. Plaintiff Southworth testified that the major student groups for which he objects to segregated fee funding are WISPIRG; the Gay, Lesbian, Bisexual Campus Center, the Campus Women's Center; the Ten Percent Society; the International Socialist Organization; and the UW Greens (Southworth depo. at 4–5). He also testified that he believed that he would object to segregated fee funding of other student groups, but that this would require him "to attempt to figure out what every single campus organization does and what kind of activities they're engaged in and then decide whether or not I have a philosophical, ideological, religious or political difference with what they're advocating ..." (*id.* at 4–5, 7). Plaintiff Southworth testified that he objects to the Lesbian, Gay, Bisexual Campus Center because it endorses and supports the homosexual lifestyle (*id.* at 14). Plaintiff identified the Ten Percent Society as an activist homosexual

organization, even more than the Lesbian, Gay, Bisexual Campus Center (*id.* at 20–22).

82. Plaintiffs are not challenging the payment of fees used to fund non-allocable expenditures (see statement by plaintiffs' counsel in Bannach depo. at 10).

83. For the 1995–96 academic year, $134.05 of a full-time student's segregated fee payment per semester was for non-allocable expenditures and for the allocable portion going to the Wisconsin Union and to intramural athletics (Mathematical result derived from Stip. ¶ 5).

84. For the first semester of the 1996–97 academic year, $142.15 of a full-time student's segregated fee payment per semester was for non-allocable expenditures and for the allocable portion going to the Wisconsin Union and to intramural athletics (Mathematical result derived from Stip. ¶ 6).

85. The remaining $32.70 per semester in 1995–96 and $48.30 for the first semester of 1996–97 consist of "allocable" fees (Mathematical result derived from Stip. ¶s 5, 6).

86. For the 1995–96 academic year, the Campus Women's Center, the Lesbian, Gay, Bisexual Campus Center and the UW Greens received $34,000; $22,042 and $6,905, respectively, out of total General Student Service Fund (GSSF) distributions of $974,200 (Stip. ¶ 17). Accordingly, the portion of GSSF funding going to these three groups were approximately 3.5% for the Campus Women's Center, 2.3% for the Lesbian, Gay, Bisexual Campus Center and 0.7% for the UW Greens (Mathematical result derived from Stip. ¶ 17).

87. The amount of a full-time student's segregated fee payment that went to GSSF in 1995–96 was $13.42 (Stip. ¶ 5). Multiplying this amount by the percentage of GSSF

funding going to the Campus Women's Center, the Lesbian, Gay, Bisexual Campus Center and the UW Greens yields approximately $0.47 as the per semester amount of a full-time student's aggregated fee payment going to the Campus Women's Center in 1995–96, approximately $0.30 as the per semester amount of a full-time student's segregated fee payment going to the Lesbian, Gay, Bisexual Campus Center and approximately $0.10 as the per semester amount of a full-time student's segregated fee payment going to the UW Greens through GSSF funding (Mathematical result derived from Defendants' FOF 15 and Stip. ¶s 5 and 17).

88. For the 1995–96 academic year, three of the student groups objected to by plaintiffs received ASM funding. The UW Greens received an event grant of $1,400. The International Socialist Organization received an operations grant of $350. The Ten Percent Society received both an events grant of $500 and an operations grant of $550, for a total of $1,050. In 1995–96 ASM grants for all student organizations totaled $109,277 (Stip. ¶ 25, attachment C). Accordingly, the UW Greens received approximately 1.3% of ASM grant funding in 1995–96; the International Socialist Organization received approximately 0.3%, and the Ten Percent Society received approximately 1.0% (Mathematical result derived from Stip. ¶ 25, attachment C).

89. Because the portion of the segregated fee going to Student Government supports the operation of the UW–Madison student government association as well as provides funding to student groups (Stip. ¶ 5), a high estimate of the per semester amount of a full-time student's segregated fee payment going to UW Greens, the International Socialist Organization and the Ten Percent Society through ASM funding in 1995–96 is derived by multiplying the percentage of total ASM grants received by each group times $4.28,

representing the portion of the per semester segregated fee that went to the ASM in 1995–96. Performing this calculation yields approximately $0.05 as the per semester amount of a full-time students's segregated fee payment going to the UW Greens through ASM grants in 1995–96, approximately $0.01 as the per semester amount of a full-time student's segregated fee payment going to the International Socialist Organization, and approximately $0.04 as the per semester amount of a full-time student's segregated fee payment going to the Ten Percent Society (Mathematical result derived from Defendants' FOF 17 and Stip. ¶ 5).

90. The number of organizations funded by the allocable portion of the segregated fee exceeds 100 (Stip. ¶S 17, 18, 25, attachments C and D).

91. Plaintiffs do not dispute that the organizations funded by their segregated fees express viewpoints with which plaintiffs both agree and disagree (Schoepke depo. at 25; Bannach depo. at 29).

92. Through segregated fee funding, the UW–Madison is not advocating a particular point of view (Bannach depo. at 13, Schoepke depo. at 25).

93. The groups funded by the segregated fees change each year, as do the amounts given to each group (Stip. ¶s 5 and 6; Ullman Affidavit, Attachment C, 1994–95 ASM Grants).

94. Plaintiffs have not presented any evidence that any group to which they would like to give money has applied for funding from the GSSF fund or from ASM and been denied such funding (Schoepke depo. at 16–17).

95. Plaintiffs do not oppose the funding of spatial fora by the UW–Madison, such as use of classrooms, building or

kiosks or provision of bulletin boards (Southworth depo. at 25–28; Bannach depo. at 51).

96. Plaintiffs do not oppose the use of UW–Madison resources, such as classrooms, staff and computers, to subsidize the spread of organizations' views (Southworth depo. at 25–26).

97. WISPIRG's funding was approved by direct student referendum (Attachment B, WISPIRG's application for funding, at Bates #283).

98. Plaintiffs see the only viable option to the Board of Regents current policy is to not fund any student organizations (Southworth depo. at 7; Schoepke depo. at 19–20).

99. The Chancellor of the UW–Madison has described the organizations, services and activities funded by the segregated fee as follows:

> Precedent has clearly established that universities are obligated not only to provide high-quality academic programs, but also to provide supportive activities affecting student academic achievement, life, and interests. These essential supportive activities include housing, food service, cultural and social programs, health care, athletics, and recreation. Administrative and financial support of these non-academic, student-related activities are required if universities are to respond adequately to student needs as well as to function in harmony with the communities in which they are located.
>
> . . . [S]ervices and programs offered by the Memorial Union, the Student Health Service, Intramural Recreation — functions supported by the Segregated University Fee — are available to *all* students and are deemed essential to creating a

> healthy, stable environment suitable for effective teaching and learning.

Ullman Affidavit, Attachment A, UW–Madison's response to Legislative Audit Bureau Survey Report, at Bates #1732).

100. All materials printed with ASM funds must contain a disclaimer that the funded organization's views are not those of ASM (Ullman aff., Attachment A — Associated Students of Madison Bylaws at Bates #51–52).

101 The Associated Students of Madison Bylaws require all events funded by events grants to be open to the entire student body (Ullman aff., Attachment A — Associated Students of Madison Bylaws at Bates #51)

102. The Associate Dean of Students of the UW–Madison has described the role of student organizations as follows:

> Student organizations at the UW–Madison contribute significantly to the diversity and richness of the university community. Student groups provide opportunities for students to learn about specific topics and to develop teamwork and leadership skills. The more than 500 student organizations registered with the University each year also develop and present most of the many out-of-class programs available to students, faculty and staff, ranging from lectures, musical events, films, debates, dance groups, and a large array of discussion groups covering special interest or skill-building topics. Funds are required to present these programs. For example, to attract a speaker of national renown, the organization often has to cover at least the travel expenses of the speaker, if not an honorarium.

(Howard aff., ¶ 2).

103. The Associate Dean of Students at the UW–Madison described the role of the organizations funded by GSSF as follows:

> During the past ten years, a number of student organizations have been formed to deliver particular services to students. Several of these service groups have applied for and received segregated fee allocations through the General Student Services Fund ("GSSF") to cover costs for staff, office rental, office supplies, etc. Legal assistance, tutoring, tenant information, and support for veterans are a few examples of these student-initiated, student-run service programs. This group of services also includes the Lesbian, Gay, Bisexual Center and the Campus Women's Center which provide information and support for LGB students and women at the University, groups that have been and may yet be targets of discrimination, attack or ignorance. For many students, these centers with their staff, small libraries, and various programs are important sources of support and serve as evidence that they are welcomed to the University community. The Madison AIDS Support Network ("MASN") is a larger community information and support organization receiving financial support from several different sources in Dane County. UW–Madison students provide segregated fee funding for additional staff to enable MASN with its county-wide responsibilities to target the University community for special efforts to provide information about AIDS to students. UW Greens and Wisconsin Student PIRG both assist students who wish to investigate environmental issues that affect the local, state, national, and international community and to consider how they might wish to become involved in seeking the resolution of the problem. WISPIRG especially has been effective in helping students identify projects that fit with their academic work in the classroom so that students can experience both service and learning around the same topic.

(Howard aff., ¶ 4).

104. Section 36.01(2), Wis. Stats., defines the mission of the UW System as follows:

> The mission of the system is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. Basic to every purpose of the system is the search for truth.

105. The UW Madison Dean of Students described the role of student organizations as follows:

> As students who lead over 500 organizations at the University each year, you make invaluable contributions to the "second curriculum" (extra-curricular activities) in our community. You and your members plan and produce a wide range of programs such as movies, chess tournaments, nationally known speakers, and folk dancers. Through these events, you make a large and complex University smaller for

thousands of students. You also provide opportunities for your membership to develop leadership skills.

Student organizations are not just "nice groups to have around" the University. When you get involved in student organizations, everybody benefits in many different ways. For example, last year's Homecoming Committee raised a substantial sum of money for the Dean of Students Crisis Fund. Student organizations have developed, and continue to support, important services for fellow students such as GUTS Tutorial, the Community Law Office, and the Student Tenant Union. You are full partners in the shaping of the community. The University gains or loses directly by the quality of your programs, the skill of your leadership, and the success you have in reaching large numbers of students.

(Stip. ¶ 25, Attachment h).

(c) *Agreed statement of major factual issues*:

The parties believe there are no issues to be tried. Accordingly, both plaintiffs and defendants have moved for summary judgment. In the event the court denies the parties' summary judgment motions, the parties believe the issue to be tried is:

(1) Whether the University has a compelling governmental interest or an interest germane to its educational mission to justify its requirement that students pay the fee?

(d) *Names and addresses of all prospective witnesses for each party*:

Plaintiffs: Scott Harold Southworth
404 State St.
New Lisbon, Wisconsin 53950

Ralph Ovadal
Box 771
Monroe, WI 53566

Keith Bannach
234 Randolph Dr. #303-D
Madison, Wisconsin 53717

Amy Schoepke
52 Goldenrod Ln. #4
Madison, Wisconsin 53719

Defendants:

Jessica Brusky
Madison Aids Support Network
303 Lathrop Street
Madison, WI 53705

Linda Dix
Assistant Director of Auxiliary Operations
UW-Madison
Room 27 Bascom Hall
Madison, WI 53706

Roger Howard
Associate Dean of Students
UW-Madison
Room 81, Bascom Hall
Madison, WI 53706

Raymond Marnocha
Vice President, UW System
Administration
Room 1752 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

Laura McKnight, Chair
Student Services Finance Committee
800 Langdon Street
511 Memorial Union
Madison, WI 53706

Lauren Onkeles
Campus Women's Center
710 University Avenue, Suite 202
Madison, WI 53715

John Peck
UW Greens
731 State Street
Madison, WI 53703

Alison Rice
Associated Students of Madison
511 Memorial Union
800 Langdon Street
Madison, WI 53706

William Richner
Assistant Vice Chancellor
UW-Madison
Room 171, Bascom Hall
Madison, WI 53706

Kerry Schumann
2705 University Avenue, #13
Madison, WI 53705

Kathleen Sell
Associate Vice President
UW System Administration
Room 1520 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

Angela Smith, Chair
Associated Students of Madison
800 Langdon Street
511 Memorial Union
Madison, WI 53706

Connie Wilson
Assistant Dean of Students
UW-Madison
Room 77 Bascom Hall
Madison, WI 53706

(e) *The names and addresses of all prospective expert witnesses for each party, together with a narrative statement of each expert's background and experience.*

Plaintiffs: None.

Defendants: None.

(f) *An itemized statement of special damages if such special damages are an element of a claim.*

There is no claim for damages in this lawsuit.

(g) *A schedule of all exhibits to be offered at trial, designating those to which objection will be made.*

Plaintiffs: Plaintiffs do not plan to submit any further evidence beyond those things it submitted to the Court for summary judgment.

Defendants:

Defendants' Exhibit 501: Full-Time Segregated Fee Dollar Distributions, First Semester 1995-96

Defendants' Exhibit 502: Full-Time Segregated Fee Dollar Distributions, First Semester 1996-97

Defendants' Exhibit 503: 1995-96 Associated Students of Madison Grant Allocations

Defendants' Exhibit 504: University of Wisconsin System Segregated Fee Allocations by Institution — Fiscal Year 1995-96, University of Wisconsin-Madison.

Defendants' Exhibit 505: The Student Services Finance Committee current policy statement

Defendants' Exhibit 506: University of Wisconsin-Madison Allocable/Non-Allocable Segregated Fee Distribution 1995-96 Annual Budget

Defendants' Exhibit 507: The University of Wisconsin System Financial Policy and Procedure Paper Number 20-Rev (3), dated June 8, 1987.

Defendants' Exhibit 508: Student Organization Handbook 1996-97 — Student Organization Office, University of Wisconsin-Madison, Dean of Students Office.

Defendants' Exhibit 509: Student Services Finance Committee — student organization application for 1996-97 GSSF funding.

Defendants' Exhibit 510: UW-Madison's Response to Legislative Audit Bureau.

Defendants' Exhibit 511: Wisconsin Student Public Interest Research Group (WISPIRG) SSFC Report/GSSF Funding Application FY '96.

Defendants' Exhibit 512: Associated Students of Madison (ASM) 1994-95 Operations Grants, Travel Grants and Event Grants.

Defendants' Exhibit 513: Associated Students of Madison Bylaws.

Defendants' Exhibit 514: Constitution of the Lesbian, Gay & Bisexual Campus Center.

Defendants' Exhibit 515: LGB Campus Center brochure.

Defendants' Exhibit 516: UW-Madison Campus Women's Center brochure.

Defendants' Exhibit 517: WISPIRG's GSSF Funding Application for 1995-96

Defendants' Exhibit 518: Lesbian Gay and Bisexual Campus Center GSSF Funding Application for 1995-96

Defendants' Exhibit 519: UW Greens' GSSF Funding Application for 1995-96

Defendants' Exhibit 520: Campus Women's Center's GSSF Funding Application for 1995-96

Defendants' Exhibit 521: United States Student Association's GSSF Funding Application for 1995-96

Defendants' Exhibit 522: Madison Aids Support Network's GSSF Funding Application for 1995-96

In light of plaintiffs' statement, defendants' reserve their objections as to foundation, hearsay and relevance of plaintiffs' exhibits. However, the parties have disclosed to each other and the court all exhibits they intend to use at trial, and believe they will be able to stipulate to a list of major exhibits.

(h) *A list of depositions, or portions thereof, to be offered at trial*:

Plaintiffs: None.

Defendants: None.

Date: November 11, 1996

JORDAN W. LORENCE
Northstar Legal Center
Counsel for Plaintiffs

SUSAN K. ULLMAN
PETER C. ANDERSON
Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH, et. al.

Plaintiffs,

v.

MICHAEL W. GREBE, et. al.

Defendants.

AFFIDAVIT OF SCOTT HAROLD SOUTHWORTH

STATE OF WISCONSIN)
) ss.
County of Dane)

SCOTT HAROLD SOUTHWORTH, being duly sworn upon oath, hereby deposes and says:

1. I am a law student at the University of Wisconsin Law School. I expect to graduate from the law school in May, 1997.

2. I attended the University of Wisconsin - Madison as an undergraduate from September, 1990 to May, 1994, when I received my Bachelor of Arts degree in Music Performance and Political Science. I began my course of studies at the law school in September, 1994. During my time at the University of Wisconsin, I have paid the segregated fee each semester.

3. I am a devout Christian. I believe that the Bible is the Word of God, and live my life according to its teachings.

4. I believe that God created sexual intercourse to be engaged in only within the institution of marriage, and I define marriage as the union between one man and one woman. Therefore, I oppose sexual intercourse outside of marriage.

5. I believe that the Bible teaches that homosexual conduct is sinful and that people should not engage in, nor be encouraged to engage in, such conduct.

6. I believe that the Bible teaches that abortion is the taking of a human life. I do not believe that abortion is morally right, and therefore I do not believe that it should be legal. In addition, I do not believe its use should be encouraged.

7. As a Republican, I support the American free enterprise system and oppose socialism and expansive governmental regulation of the economy.

8. As a member of several local, state and national conservation groups, I am a vocal advocate of a clean and safe environment. I support voluntary environmental management and necessary governmental intervention, but oppose undue regulation by an overbearing government.

9. I support Governor Tommy Thompson and his policies. I also support the Republican Congress' Contract with America.

10. Since I drive west on U.S. Highway 12, and know first-hand of its dangerous conditions as a two-lane highway, I support its expansion to four lanes, because it will create a safer driving environment for myself, as well as others who travel along the route.

11. I may not disagree with the ideological viewpoints of every student group that receives funding through segregated

fees. However, I do not believe that the University of Wisconsin should force students to fund the political or ideological advocacy of any student group. I believe that students should have the choice of supporting only those groups with which they agree — if any — without coercion.

12. I served as the Chairman of the UW-Madison College Republicans from May, 1992 through May, 1994. While Chairman, I was approached as to the possibility of applying for funding through the student government (at that time called the Wisconsin Student Association). I, along with the Executive Board of the UW-Madison College Republicans, refused to apply for student funding because we did not agree with forcing other students to support our ideological viewpoint. Our organization only accepted voluntary contributions from students and the community.

13. The University of Wisconsin system of forcing students to fund political or ideological advocacy groups through the mandatory student fee forces me to choose between receiving an education at the only public law school in the state, or staying true to my religious, political, and ideological beliefs.

14. I personally spoke with various members of the student government and student organizations. I also picked up evidence from various student organizations on campus.

/s/ Scott Harold Southworth
SCOTT HAROLD SOUTHWORTH

Subscribed and sworn to before me this 2nd day of October, 1996.

/s/ Pamela [illegible]
Notary Public

My commission expires on 11-9-97

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-3510 and 97-3548

SCOTT HAROLD SOUTHWORTH, et al.,
Plaintiffs-Appellees, Cross-Appellants,

v.

MICHAEL W. GREBE, et al.,
Defendants-Appellants, Cross-Appellees.

AFFIDAVIT OF KENDRA FRY

STATE OF WISCONSIN)
) ss.
County of Barron)

KENDRA FRY, being duly sworn upon oath, hereby deposes and says:

1 I am a student at the University of Wisconsin. I expect to graduate from the University of Wisconsin in December 2000.

2. During my time as a student at the University of Wisconsin, I have paid the segregated fee each semester I have attended.

3. I am a devout Christian. I believe the Bible is the Word of God and I live my life according to its teachings.

4. I believe that God created sexual intercourse to be engaged in only within the institution of marriage, and I define marriage as the union between one man and one

woman. Therefore, I oppose sexual intercourse outside of marriage.

5. I believe that the Bible teaches that homosexuality is sinful and that people should not engage in, nor be encouraged to engage in, such conduct. I would not voluntarily contribute money to an organization that promotes homosexuality or disagrees that homosexual conduct is sinful.

6. I believe that marriage should be defined as one man and one woman. I agree with the Bible's teaching that God created marriage that way from the beginning. Therefore, I oppose same-sex marriage and legal recognition for unmarried "domestic partners." I support efforts like the Defense of Marriage Act to protect the traditional definition of marriage. I would not voluntarily contribute funds to any organization that favors same-sex marriage or legal benefits for unmarried "domestic partners."

7. I believe the Bible teaches that abortion is the taking of a human life. I believe that abortion is morally wrong, and therefore, I do not believe that it should be legally protected. In addition, I do not believe that abortion should be encouraged. I would not contribute financially to any organization supporting legalized abortion.

8. I support the American free enterprise system and oppose socialism and expansive governmental regulation of the economy. I would not voluntarily contribute money to an organization that promotes socialism or expansive governmental regulation of the economy.

9. I am a vocal advocate of a clean and safe environment. I support voluntary environmental management and necessary governmental intervention, but oppose undue regulation by an overbearing government.

10. I support Governor Tommy Thompson and his policies. I also support the Republican Congress' Contract with America.

11. I support the government's use of the death penalty for murder, and I oppose contributing funds to any group that advocates abolition of the death penalty.

12. I would not voluntarily contribute funds to organizations advocating viewpoints contrary to the ones I have expressed in this affidavit.

13. I may not disagree with the ideological viewpoints of every student group that receives funding through the segregated fees at the University of Wisconsin-Madison. However, I do not believe that the University of Wisconsin should force students to fund the political or ideological advocacy of any student group. I believe that students should have the choice of supporting only those groups with which they agree — if any — without coercion.

14. The University of Wisconsin system of forcing students to fund political or ideological advocacy groups through the mandatory student fee forces me to choose between receiving an education at the only public law school in the state, or staying true to my religious, political and ideological beliefs.

/s/ Kendra Fry
Kendra Fry

Subscribed and sworn to before me this 18 day of August, 1998.

/s/ Terry L. Lansin
Notary Public

My commission expires on 5-5-2002

1995 DISORIENTATION MANUAL

new to campus?
tired of orientation?

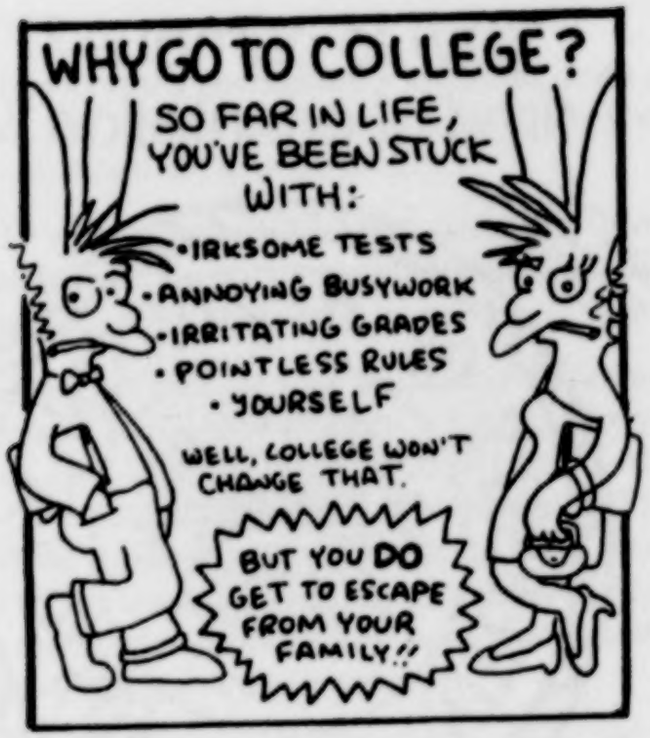


GET

DIS-ORIENTED!

What? A *Disorientation*?!

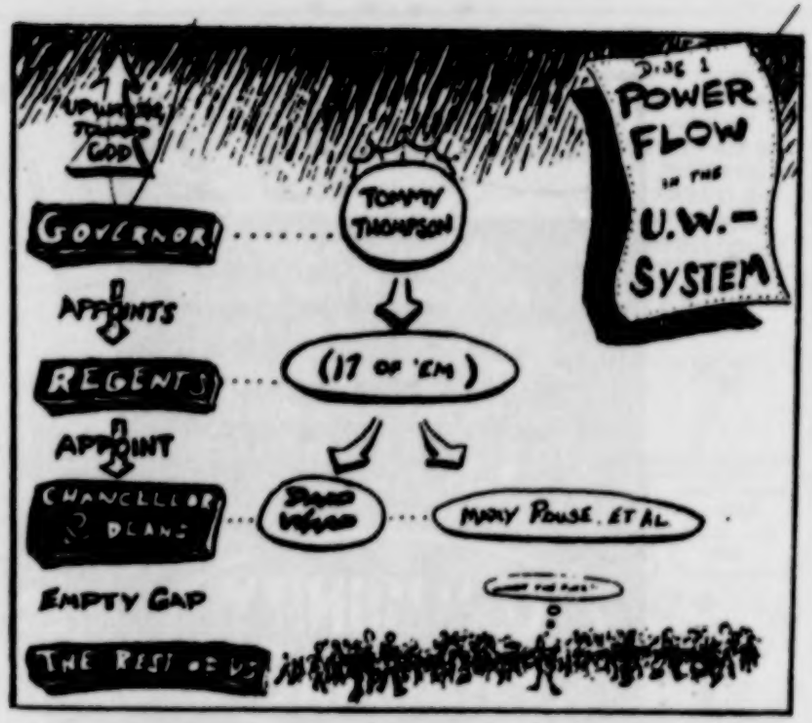
* * * *



* * * *

fart in the face of authority

* * * *



PSN Quiz

Profiting from the labor of others is called?

A) Indolence
B) Thievery
C) Capitalism
D) All of the above

* * * *



* * * *


and then I confronted my racism, sexism & homophobia
Why not change your pharmacy, too? If a worker-owned, team-managed pharmacy that features natural remedies & environmental body care sounds good...check us out! You may never have to buy from capitalist pigs again!
COMMUNITY PHARMACY
State & Gorham
phone 251-3242, tty 251-5339,
prescriptions 251-4454

* * * *


COMICS
THOMPZAN
KING OF THE JUNGLE! GOVERNOR OF WISCONSIN! FRIEND OF MULTI-NATIONAL CORPORATIONS!
LOOK, LARRY! A CAMPAIGN CONTRIBUTION FROM A WEALTHY, INFLUENTIAL BIG SHOT!
LET'S GO FOR IT!
AIEEEEEEEE
SLAMMM
ARRGH! DAMNED ENVIRONMENTALISTS AND THEIR TREES!
I BET THEY PLANTED IT THERE ON PURPOSE! THEY'RE ALL OUT TO GET ME!
DID THE CONTRIBUTOR GET AWAY, O GREAT WHITE HUNTER?
DON'T WORRY, LARRY. HE'LL FIND ME
YOU KNOW, LARRY, I'VE BEEN THINKING. WHAT THIS JUNGLE NEEDS IS MORE JOBS. THE KIND THAT COMES FROM LAYING WASTE TO THE ENVIRONMENT.
A MINE! THAT'S IT! WE NEED A MINE. COPPER. LEAD. URANIUM.
WOULD THIS IN ANY WAY BE RELATED TO THE BIG CAMPAIGN CONTRIBUTIONS YOU GOT FROM EXXON MINING?
THAT'S A LOT OF BANANAS, LARRY
THERE'S AN ELECTION THIS FALL, THOMPZAN. BE SURE YOU DON'T SLIP ON ANY BANANA PEELS

* * * *

Hmmm . . Now that's Queer . . .

Congratulations! You've stepped out of whatever homohating hometown you probably "grew up" in and have come to the only Midwestern mecca where gay rights exist, bisexuals can flirt shamelessly, and our family is so comfortable that we can even afford that sociopolitical luxury of infighting.

Of course, isn't it odd that the military Reserve Officer Training Corps (ROTC) openly discriminates against homosexuals but is still allowed on campus (despite UW policy). Also, spouses of UW students get UW health benefits, while legally-sanctioned "domestic partners" (the only way for homosexuals to marry in WI) of UW students don't. Heck, Les-Bi-Gay activists couldn't decorate Bascom Hill with pink triangles for "Coming Out" week, while the homecoming committee was allowed to decorate willy-nilly. But that's "tradition," sayeth the Chancellor. And off the law books, there's still a lot of LGB-bashing. For e.g., students were called "fags," etc. and threatened with violence by some fraternity members. The Dean of Students and the Interfraternity Council found that the fraternity needed no sensitivity workshop.

WHAT CAUSES HETEROSEXUALITY?

So get out there and make yourself at home in Madison, but don't be fooled: there's plenty of room in this community for more volunteers, more openness and communication, and more coalition building. Educate yourself, but be sure to educate your classmates and you school at the same time.

* * * *

Classifieds

Wanted
Student Apathy Project Manager (SAPM) Live in dorms, drag down peers to protect corporate oligarchy. Free Beer, Nintendo. Must be too cool. 1-800-SEL-LOUT

For Sale
State of Wisconsin forests, waters, schools. Worst offer(w/campaign contrib). Call Guv Thompson 266-1212

Stereotype Special
White-male-rich-kid-holding-keys-to SAAB statue @ Engineering Bldg. MUST GO! John 262-3482

So what if the 60's are over?

So now that you've finished perusing this manual, hopefully you're disoriented enough to start questioning this fine University. The greed, racism, sexism, homophobia, and ecological destruction here and just about everywhere do not exist independently, but are ominously intertwined in a mee of cultural baggage.

But do we just retreat with our knowledge into a coffeehouse and grumble? No—we ORGANIZE! Madison has a good reputation for activism, from the enormous protests and student strikes during the Vietnam War, to last year's rallies against purging the homeless from campus, tuition hikes, a draconian state budget, the Con__ act with America,

and many other timely events. And don't forget to state what you're *for* when you state what you're *against!*

Knowing our history as student activists is crucial. We need to remember and learn from the mistakes of our predecessors, such as sexism in the Vietnam-era Students for a Democratic Society. Likewise, we need to keep constant watch over our own actions — aware of deliberate attempts to undermine a movement, yet open to legitimate criticisms.

An d for those who think the "in your face" tactics of the 1960's are passé, remember what Frederick Douglass said:

> "If there is no struggle, there is no progress. Those who profess to favor freedom and yet renounce controversy are people who want crops without ploughing the ground."

There are lots of groups listed in here to get involved with — try the ones listed below too. Better yet, make some connections among groups with common issues. Get out there and make some noise!

UW-Green/Progressive Student Network
731 State St. (Pres House) 262-9036

* * * *

ASM Funded by the Associated Students of Madison
The ASM does not necessarily endorse this organization or its beliefs

WISPRIG STUDENT FEE APPLICATION 95-96

Wisconsin Student Public Interest Research Group (WISPIRG) Budget FY '96

Total Operating Surplus:		4,404

(Budgeted to effectively run an expanding internship, campus, and statewide program by maintaining staff.)

Net Income:

Segregated Fees	45,000
10% GSSF Fee Increase	4,500
Grassroots Fundraising	2,500

(Includes: bake sales, benefit concerts, t-shirt sales, button sales, and other fundraising activities.)

Total Income:	52,000

Expenses:

Personnel		35,500
Salaries	32,650	
Medical Coverages	2,900	

(Includes: Two campus staff; both of which are responsible for coordinating internship programs, training volunteers, helping students design campaigns, working with the University faculty and administration, and coordinating statewide advocacy and service work. programs.)

Operating Expenses		10,225
Accounting	100	
Advertising	200	
Conferences	300	
Filing fees	20	

Office supplies	250
Photocopying	1,000
Postage	200
Publication/print	500
Rent	3,455
Telephone	2,400
Travel	1,800

U.S. PIRG 2,500

(The national advocacy and research branch of the state PIRG's. Professional staff represent students in the U.S. Congress on issues such as the environment, consumer protection, and democracy. The U.S. PIRG staff also research issues, provide weekly campaign and issue updates to state campus chapters, and release reports on such issues as water pollution, wasteful packaging, and bank fee abuses.)

PIRG Development 7,828

(Includes: Campus staff trainings, national campus staff backup, campus team contribution, and other developing state resources. National campus materials; such as, posters, brochures, production template designs and grassroots organizing manuals.)

Total Expenses:	56,103
FY '95 Operating Surplus:	(4,103)
Total Operating Surplus:	301

WISPIRG
THE BEAST

FIRST EDITION
Tuesday September 20th, 1994
Volume 1 Issue 1
Wisconsin Students Public Interest Research Group
306 North Brooks
Madison, WI 53715 251-1918

Welcome to the Fall 1994 WISPIRG General Interest Meeting! This semester looks to be very exciting, because not only are we focusing on the campaigns below, but also on creating a new WISPIRG chapter at the University of Wisconsin Milwaukee. WISPIRG students are developing the program to be a stronger power statewide while continuing our campaign and service work locally and nationally. WISPIRG is a great chance for us all to develop our skills and learn about ourselves while working on the issues that we care about. Thanks for coming, and have fun.

Students' Right Campaign

It is not enough to simply complain about the things that you feel are unfair. You must act upon those issues in order to bring about a better solution for yourself and everyone else. Our campaign will work on issues such as a campus book swap, expanding food service selection, and controlling and lowering of food prices. Both will help students to more efficiently use our resources while increasing the quality and selection that we deserve. Our first project is bikes and blades. It will better inform students of prices and services they can take advantage of.

Lisa Fonseca: 258-9223

Endangered Species Campaign

The world is faced with the greatest rate of extinction since the disappearance of the dinosaurs 65 million years ago. In fact, by the year 2000, up to 100 species per day will become extinct. WISPIRG will focus on raising local awareness of these problems and will target Senator Herb Kohl for reauthorization and strengthening of the Endangered Species Act to include recovery plans that protect habitats, prioritization of species that would reduce the threat of extinction to other species, and increase funding for enforcement.

Annie Davini: 259-9430 Jen Peterson: 264-2922

Safe Drinking Water Campaign

Currently in the United States, 30% of rivers and 50% of lakes are not safe for fishing or swimming, much less drinking. The crisis was driven home last year when over 400,000 Milwaukee citizens became ill and more than 100 died from drinking contaminated tap water. WISPIRG will focus on channeling this local concern into the Clean Water Act and the Safe Drinking Water Act, both of which need to be strengthened to include phasing out toxic chemicals, requiring industries to invest in pollution prevention, and eliminating contamination from poisonous runoff.

Annie Davini: 259-9430 Joanna Woolman: 264-0229

Save the Frogs

This Campaign will focus on a variety of environmental concerns using the plight of the frogs as an analogy. We will explore the issues of ozone depletion, global warming, habitat destruction, and toxic hazards, as well as solutions to these problems. These solutions include reducing Chloro-Floro-Carbons (CFC's), reliance upon fossil fuels, encroachment

upon habitats, and chlorine emissions. As an indicator for the human race, the welfare of the frogs demands close scrutiny and attention.

Annie Davini: 259-9430 Emily Miller: 255-6504

Green Campus

The Green Campus campaign focuses on environmental concerns within the University. We will address problems such as recycling and waste issues, as well as green spaces and pesticides. Participants of this campaign will be able to see direct results of their actions, and will help to make our home here more environmentally friendly.

Esther Miller: 258-9223

Hunger and Homelessness

This semester the Hunger and Homelessness project will help feed and shelter those in need, and work toward getting them back on their feet with job training for the future. We also hope to educate students and the community about the plight of the homeless. We all know that with knowledge comes compassion and an enthusiasm to help.

Sara Mohlberg: 264-3235 Carlough Faulkner: 264-2482
Tom Peterson: 264-2394

Environmental Education

The Environmental Education project's key goal is to educate and discuss our environmental needs, harms, and future solutions with grade school children. Ideas such as reduce, reuse, recycle; endangered species, and ecosystems and biodiversity will be presented. We will also be involved in voicing our concerns about the level of environmental education in the public schools. Since Environmental Education is an excellent outreach to both elementary students

and the general public, we need lots of enthusiastic volunteers to expand our program, and to build strong bonds between children and the environment.

Jennifer C. Young: 264-0507

Statehouse Watch

Statehouse watch is a group of students focused on state politics and legislation regarding environmental and political issues. This semester we will be focused on the impacts of mining in Wisconsin. We will be educating the public, gathering support for the anti-mining campaign, and lobbying on behalf of concerned students and citizens.

Elizabeth Vogel: 284-6272 Rhonda Petrie: 264:2929

Voter Registration

WISPIRG's voter registration and voter education drive is particularly exciting this year in Wisconsin because of the governor's election and other key elections in the Senate and the House. You, me, and our fellow students can and will effect the outcome of these races. WISPIRG, in coalition with other campus groups intends to register thousands of new voters and provide students with candidate information regarding environmental, consumer, and good government issues. This large informed student vote will send a message to the nation that students care. Students should have a say as to how this country is run, we will demand that our concerns be heard and addressed.

Scott Hanson: 251-6046

Thursday October 13th, 1994
Volume 1 Issue 2
Wisconsin Students Public Interest Research Group
306 North Brooks Madison, WI 53715 251-1918

* * * *

Still Rocking the Vote

On Friday, October 7th, Library Mall was host to an exciting afternoon of political empowerment and electrifying live music. The event, sponsored by the Voter Coalition, registered over 400 Madison residents to vote in the upcoming election. The Voter Registration Coalition is composed of WISPIRG, TAA, Students for Hecht, Students for Chavala, USSA, and ASM. WISPIRG's Voter Registration/Education campaign has been the driving force behind the coalition's efforts. ASM financially supported the effort by paying for such things as a sound man, insurance, and the rental of a PA system.

Cool Hand Band, Fez Petting Zoo, and Robjobs presented the music. They were all very supportive to the idea of increasing student voting, and all presented quite a show. They played to a packed Library Mall that was filled with enormous excitement and enthusiasm. "Students were presented with an opportunity to become involved, and they responded enthusiastically," said Scott Hanson.

Interns Scott Hanson and Kari Olson deserve special recognition for the work that they've done to register over 1,000 students in the first week. The next phase will focus on going to class rooms and the Badger game to register new voters. With one week to go, the group believes that this can be one of the most successful voter campaigns in Madison history.

Dirty Water Wednesday

If you were on campus, September 28th, you couldn't miss Safe Drinking Water's event, "Dirty Water Wednesday." The group decorated the campus with tape outlines of bodies near water fountains (bubblers) and a huge faucet in Library Mall. They also posted fact cards around campus to increase public awareness about the necessity of strengthening the Safe Drinking Water Act.

In one day the group was able to collect 450 postcards. Joanna Woolman, coordinator of the project, said "I'm proud of all the work we did and what we accomplished." The postcards' target was EPA administrator Carol Browner. The Safe Drinking Water Act is making progress through congress as we speak.

Zoo of the Future

Step through time to the Zoo of the Future. Be afraid. Know that what you see can and will happen unless we work to change our destructive ways. The display, put on by the Endangered Species campaign, will be on Library Mall from 9am to 3pm Thursday, October 13th. Volunteers will staff the display to help answer questions and inform people of the problem we are facing, and how we can begin to fight it. The first step is to support strengthening amendments to the Endangered Species Act. Come out and join history!

* * * *

Thursday October 20th, 1994
Volume 1 Issue 3
Wisconsin Students Public Interest Research Group
306 North Brooks Madison, WI 53715 251-1918

* * * *

Statehouse Watch: Mine Killers

State House Watch hobnobbed with members of Spencer Black's office last week, and got some great feedback on our mining reform campaign. This week we will be targeting the tourism industry of Wisconsin to get their support for mining reform.

Don't forget to check the papers for our letters to the editors.

Thanks everyone for helping out with Milwaukee!

How to Make Friends and Influence People the SDW Way

Safe Drinking Water is conducting a letter-writing campaign. The campaign focuses on Green Voter issues such as the Safe Drinking Water Act. The targets for this campaign are Representative Klug, Senator Kohl, and Candidates Hecht and Welch. SDW has already had a letter writing party to send out dozens of letters. We encourage WISPIRGers to help out by writing to their representatives. Writing letters like these are a great way to let your voice be heard, while influencing our politicians.

Here is a sample letter so that you can have an influence. It only takes a quick minute to write your own letter, but it could be your writing that makes the difference in a politicians vote.

October 23, 1994

Candidates' Campaign office address
Dear Representative/Candidate:

There is an alarming trend taking shape in America. Although public concern about the environment remains high, our leaders have taken less and less action to respond to this public desire. The departing 103rd Congress succeeded in passing almost no environmental legislation.

It is the duty of our leaders to consider how legislation will effect the environment, and the safety and well being of our members. Too often we witness them surrendering to industry and polluters interests at the expense of public health and the health of the environment. Mining related PAC's contributed $17.2 million to congressional campaigns from 1987-1994. An additional $56 million was spent to fight the reauthorization of the Clean Water Act during the same time period.

Examples of missed opportunities to move us towards a healthy environment include the following:

- Reforming the Mining Law Act
- Passing a new Endangered Species Act
- Strengthening the Clean Water Act
- Strengthening the Safe Drinking Water Act

Every time that our leaders fail to enact meaningful legislation, it enables industries to continue to exploit, pollute, and destroy our natural resources. Signing on to the Green Voter Pledge is the best way to ensure that critical environmental issues will be debated, discussed, and supported in the 104th Congress.

I am planning to vote for the candidates who will fight for laws to clean up and protect the environment. Strong leadership from our elected officials can make this country a safe and healthy place to live. I look forward to hearing from you on these critical issues.

Sincerely,

YOU!

* * * *

I'm Sure as Heck Going to the Rally!

For those of you who don't know, there will be a mass demonstration and rally at the Capitol steps on Wednesday, October 26th at 12:00 p.m.. The rally is to protest education cuts and tuition hikes being proposed by the State Legislature and the Governor. Students from throughout the state are coming. Jesse Jackson is scheduled to appear. The demonstration will be nationally televised. It is an excellent opportunity for student activism to have a direct impact.

* * * *

WISPRIG' GREEN VOTER GUIDE
U.S. HOUSE SEAT, WISCONSIN DISTRICT 2

* = Stumpf supports preservation through privatization and stat laws over areas.
? = Klug was contacted several times, but did not respond to this survey.
\+ = Schumacher was not sure and needed more information on those subjects/

Will Support These Issues If Elected:	Hecht	Klug	Schumacher	Stumpf
SOLID WASTE:				
• Pass a national Bottle Bill, (H.R.1818 and S.818), that will put a $0.10 deposit on all beverage containers to promote recycling.	YES	?	YES	YES
• Create recycling markets by requiring 50% recycled content in newspapers and packaging and requiring gov't purchasing of recycled products.	YES	?	+	NO
• Place a moratorium on new solid waste incinerators until the year 2000 (H.R.2488).	YES	?	YES	YES

Will Support These Issues If Elected:	Hecht	Klug	Schumacher	Stumpf
TOXIC POLLUTION:				
• Strengthen the Clean Water Act by stopping illegal discharges and strengthening enforcement (H.R.2727), stopping poisonous runoff (H.R.2543) and preventing future pollution by phasing out the use of dioxin-forming chlorine in the pulp and paper industry (H.R.2898).	YES	?	YES	YES
• Strengthen the Safe Drinking Water Act by eliminating toxic chemical contamination, protecting the most vulnerable populations, and preventing pollution at the source.	YES	?	YES	YES
• Expand citizens' right to know by expanding public reporting on toxic chemical production use, and emissions.	YES	?	YES	YES
• Clean up the dumps and make polluters pay for hazardous waste cleanups by maintaining Superfund's strict liability system.	YES	?	+	YES

Will Support These Issues If Elected:	Hecht	Klug	Schumacher	Stumpf
GLOBAL WARMING & ENERGY				
• Curb global warming by requiring more fuel efficient cars and light trucks averaging at least 45/34 m.p.g. by the year 2004, and by reducing domestic emissions of carbon dioxide by 20% by the year 2005.	YES	?	+	YES
• Create an environmentally sustainable energy policy by shifting toward energy efficiency and renewable energy and away from polluting nuclear and fossil fuels (H.O.R.188), and by placing a moratorium on the construction of new nuclear power.	YES	?	YES	YES

Will Support These Issues If Elected:	Hecht	Klug	Schumacher	Stumpf
ENVIRONMENTAL PRESERVATION:				
• Strengthen the Endangered Species Act (H.R.2043 and S.921).	YES	?	YES	NO
• Strengthen preservation of our wetlands (H.R.350 and S.1195).	YES	?	YES	NO*
• Designate the Arctic National Wildlife Refuge as a wilderness area (H.R.39 and S.39).	YES	?	YES	NO*
• Stop new offshore drilling.	YES	?	+	NO*
• Prevent further destruction of our public rangelands by setting environmental standards fro grazing and increasing grazing fees to fair market value.	YES	?	YES	NO*
• Reform the 1872 Mining Law to stop the giveaway and destruction of our public lands (H.R.322 and S.275).	YES	?	YES	NO*
• Eliminate subsidies for polluting industries such as tax breaks for oil drilling and mining, and below cost timber sales.	YES	?	YES	YES
[Source: U.S. PIRG Green Voter Campaign]				

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE, and KEITH BANNACH,
Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR;
JONATHAN B. BARRY; JOHN T. BENSON;
BRIGIT E. BROWN; JOHN BUDZINSKI;
ALFRED S. DE SIMONE; LEE S. DREYFUS;
DANIEL C. GELATT; KATHLEEN J. HEMPEL;
RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH;
VIRGINIA R. MACNEIL; SAN W. ORR, JR.;
GERARD A. RANDALL, JR.; JAY L. SMITH and
GEORGE K. STEIL, SR., all in their official
capacities as members of the Board of Regents
of the University of Wisconsin System,
Defendants.

SECOND AFFIDAVIT OF JORDAN W. LORENCE

COMMONWEALTH OF VIRGINIA)
) ss.
County of Fairfax)

JORDAN W. LORENCE, being duly sworn upon oath, hereby deposes and says:

1. I am the attorney of record for the plaintiffs in this case.

2. On October 29, 1996 and November 5, 1996, I access the Internet website of the U.S. Public Interest Research Group (U.S. PIRG) and the affiliate state PIRGs. I accessed that web site at this Internet address —

http://www.igc.apc.org/pirg/homepage.htm.

3. From that U.S. PIRG Internet website, I printed the title page (one page total), the page entitled "United States Public Interest Research Interest Group" (three pages total) the page entitled, "Wisconsin Public Interest Research Group" (one page total), the page entitled, "The PIRGs' Campus Chapters" (one page total); the press release dated September 6, 1996 entitled, "PIRG Grades Congress on Public Interest Issues: Scorecard Available on the Worldwide Web" (one page total); the "PIRG 1996 Congressional Scorecard" (one page total); the "PIRG 1996 Congressional Scorecard: Wisconsin" (two pages total); the "PIRG Congressional Scorecard U.S. House of Representatives Votes" (five pages total); the "PIRG 1996 Congressional Scorecard U.S. Senate Votes" (five pages total); and the "PIRG 1996 Congressional Scorecard Heroes and Zeroes" (two pages total).

4. On November 1, 1996 I visited the office of U.S. PIRG at 218 D. St. SE in Washington, D.C. At the U.S. PIRG office I was given one sheet of paper entitled, "U.S. PIRG's Campaign to Cut Polluter Pork: End Taxpayer Handouts to Polluters. This piece of literature also has a drawing of a pig with dotted lines on it, like a butcher's drawing. The pages that I include with this affidavit are true and exact copies of the screens I saw at this Internet site.

5. During the discovery period in this case, I received from Susan Ullman, counsel for the University, a number of documents that were numbered with Bates numbers. These are JWL Bates number pages 274-297, which is the Student WISPIRG application for GSSF funding for the 1995-96

school year. This document is also attached to the Affidavit of Susan Ullman, dated October 8, 1996.

/s/ Jordan W. Lorence

Jordan W. Lorence

Subscribed and sworn to before me this 5th day of November 1996.

[signature illegible]

Notary Public

My commission expires on Sept. 30, 2000

PIRG 1996 CONGRESSIONAL SCORECARD: WISCONSIN

	Wisconsin	Numbered votes - see below for a short description																		
	Representative	Rating	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
1	NEUMANN (R)	26	-	-	-	-	-	-	-	-	+	+	+	+	+	+	+	+	+	+	+
2	KLUG (R)	63	-	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
3	GUNDERSON (R)	37	-	-	-	+	-	+	-	+	+	+	+	+	+	+	+	+	+	+	+
4	KLECZKA (D)	79	+	+	A	+	A	+	+	+	+	+	+	+	+	+	+	+	+	+	+
5	BARRETT, T. (D)	95	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
6	PETRI (R)	32	-	-	-	+	-	+	-	+	+	+	+	+	+	+	+	+	+	+	+
7	OBEY (D)	79	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
8	ROTH, TOBY (R)	21	-	-	-	-	-	-	-	-	+	+	+	+	+	+	+	+	+	+	+
9	SENSENBRENNER (R)	37	-	-	A	-	-	-	-	-	+	+	+	+	+	+	+	+	+	+	+

KEY: (+) Favorable (-) Unfavorable (A) Absent (P) Present (NA) Not Available

PIRG 1996 Congressional Scorecard
U.S. House of Representatives Votes

1) Oppose Health, Safety Rollback (2/28/95)
Environmental Defense Campaign
The "Risk Assessment and Cost Benefit Act" would require lengthy, complicated risk assessment and cost-benefit studies before most new public health and environmental protection programs would take effect. The bill would increase red tape and bureaucracy by requiring bureaucrats to quantify the harm caused by a particular chemical or pollutant, replacing environmental and health-based standards with cost-benefit analysis. EPA estimates that it would take 1,000 new bureaucrats and $220 million to conduct all of these risk studies.
Adopted 286-141 on February 28, 1995.
PUBLIC INTEREST VOTE: NO

2) Oppose Takings/Compensation for Polluters (3/3/95)
Environmental Defense Campaign
The "Private Property Rights Act" would require the government to compensate landowners who claimed that their property is devalued by 20% from compliance with wetlands protection or endangered species preservation laws. Taxpayers would have to pay land speculators not to destroy the wetlands or endangered species habitat on their land.
Adopted 278-147 on March 3, 1995.
PUBLIC INTEREST VOTE: NO

3) Oppose Environmental Rollback/Contract (3/3/95)
Environmental Defense Campaign
The bill combined the final versions of the risk assessment, takings and other anti-public interest provisions from so-called regulatory reform bills into one bill.
Adopted 277-141 on March 3, 1995.
PUBLIC INTEREST VOTE: NO

4) Oppose "Dirty Water Act" (5/16/95)
Environmental Defense Campaign
Rep. Shuster (R-PA) introduced a "Dirty Water Act" (H.R. 961) that would reauthorize and rewrite the Clean Water Act. The bill would relax or waive federal water pollution control regulations, allow more toxic chemicals and sewage into waterways, remove up to 80 percent of wetlands from federal protection, and require the federal government to reimburse landowner if wetlands protections cause a 20 percent decrease in value to any portion of their land.
Adopted 240-185 on May 16, 1995.
PUBLIC INTEREST VOTE: NO

5) Oppose Pro-Polluter "Riders"/EPA Budget (7/31/95)
Environmental Defense Campaign
Anti-environmental forces in Congress attached 17 "riders" to the Fiscal 1996 VA-HUD Independent Agencies Appropriations Bill (H.R. 2099), which funds the EPA. These riders would have weakened key sections of the Clean Air Act, Clean Water Act, Safe Drinking Water Act and Community Right to Know Act. Reps. Stokes (D-OH) and Boehlert (R-NY) offered an amendment to eliminate the anti-environmental riders from the EPA Budget.
On July 28, 1995, the amendment was adopted by a narrow six-vote margin. Three days later, On July 31, 1995, the Stokes-Boehlert amendment was rejected 210-210.
PUBLIC INTEREST VOTE: YES

6) Oppose Pro-Polluter "Riders"/EPA Budget (11/2/95)
Environmental Defense Campaign
The House again considered the 17 anti-environmental riders on the EPA Budget. During a vote naming conferees to the House-Senate Conference Committee on H.R. 2099, Rep. Stokes (D-OH) offered a motion to instruct the House

conferees to drop the anti-environmental riders in the conference.
The motion was adopted 227-194 on November 2, 1995.
PUBLIC INTEREST VOTE: YES

7) End Logging Without Laws (3/15/95)
Environmental Defense Campaign
Under the guise of promoting sales of "salvage" timber in our national forests, the House Appropriations Committee added language to a spending cuts bill to more than double logging and clearcutting in our ancient forests while exempting these timber sales from all federal environmental laws. U.S. taxpayers will spend an additional $200 million a year on timber industry subsidies because of this provision, and citizens are powerless to block these sales because of environmental concerns. Rep. Yates (D-IL) offered an amendment to strip this provision from the bill.
Rejected 150-275 on March 15, 1995.
PUBLIC INTEREST VOTE: YES

8) Stop Tongass Forest/Mining Giveaways (11/15/96)
Campaign to Cut Polluter Pork
The House/Senate conference on the Interior Appropriations bill removed a one-year moratorium on the sale of public lands to the mining industry for $2.50 - $5.00 per acre from the bill and added language to increase logging in Alaska's Tongass National Forest, already the biggest money-loser in terms of below-cost timber sales. Led by Rep. Yates (D-IL), the House twice rejected the Interior Appropriations Conference Report because of the mining and Tongass Forest issues.
The House adopted the second motion to reject the Conference Report 230-199 on November 15, 1996.
PUBLIC INTEREST VOTE: YES

9) End Dangerous Nuclear Program (7/11/95)
Campaign to Cut Polluter Pork
The Gas Turbine-Modular Helium Reactor (GT-MHR) lacks containment structures to prevent radiation from escaping into the environment in the case of an accident. The gas-cooled reactor received the fourth worst grade in a 1991 Department of Energy report ranking 23 energy technologies on the basis of economic and energy potential, environmental impact and technical risk. Reps. Klug (R-WI), Foley (R-FL), Obey (D-WI), and Luther (D-MN) offered an amendment to the FY 1996 Energy and Water Appropriations bill to cut the $12 million appropriation for this dangerous technology.
Adopted 306-121 on July 11, 1995.
PUBLIC INTEREST VOTE: YES

10) Stop Giveaway to Mining Companies (7/18/95)
Campaign to Cut Polluter Pork
The Mining Law of 1872 is the "granddaddy" of all polluter pork programs. Under this archaic law, gold, silver and other hardrock mining companies extract billions of dollars of minerals from public lands with no return to the federal Treasury. Under this 124-year old corporate welfare program, these companies may purchase the land for $2.50 to $5.00 per acre through a process called "patenting," and often leave highly-contaminated rivers, groundwater and land which then must be cleaned at taxpayer expense. Reps. Klug (R-WI) and Rahall (D-WV) offered an amendment to the House Interior Appropriations bill which would extend for one year the moratorium on patenting public lands.
Adopted 271-153 on July 18, 1995.
PUBLIC INTEREST VOTE: YES

11) Stop Sugar Industry Subsidy (2/28/96)
Campaign to Cut Polluter Pork
Through a series of trade restrictions and price controls, the U.S. sugar industry reaps an extra $1.4 billion annually from U.S. consumers. U.S. sugar prices are double those on the world market. Increasing production of sugarcane in the Florida Everglades, spurred by this consumer subsidy, has caused disruption of the water flow to the ecosystem and has dumped tons of pollutants, mostly phosphorous, into the Everglades.
In the House, an amendment offered by Reps. Miller (R-FL) and Schumer (D-NY) to reform the sugar program was rejected 208-217 on February 28, 1996.
PUBLIC INTEREST VOTE: YES

12) Stop Building Roads for Timber Industry (7/18/95)
Campaign to Cut Polluter Pork
Taxpayer funds are used to build Forest Service roads. These are built so that the timber industry can gain access to national forests. Because the Forest Service sells the timber for less than the cost of the roads and other program costs, a recent General Accounting Office study found that taxpayers lost $955 million in the timber program from 1992 through 1994. Rep. Kennedy (D-MA) offered an amendment to the Interior Appropriations bill which would have prohibited road-building in roadless areas.
Rejected 166-255 on July 18, 1995.
PUBLIC INTEREST VOTE: YES

13) Eliminate Tobacco Industry Subsidy (7/20/95)
Campaign to Cut Polluter Pork
During consideration of the Agricultural Appropriations Bill, Reps. Durbin (D-IL), Smith (R-WA) and Hansen (R-UT) offered an amendment to cut $23 million in taxpayer subsidies to the tobacco industry. Tobacco pork is particularly

egregious, since the tobacco industry not only generates $45 billion in annual revenues, but sells a product that, when used as directed, kills 434,000 Americans each year including 50,000 non-smokers exposed to second hand smoke.
Rejected 199-223 on July 20, 1995.
PUBLIC INTEREST VOTE: YES

14) Increase Funding for Solar Energy (7/12/95)
Campaign for R.E.A.L. Energy
Energy use and production is the largest source of pollution, yet the House Science Appropriations committees cut funding for clean renewable energy sources (solar, geothermal, biomass and wind) by 43% compared to 1995 levels. Rep. Klug. (R-WI) offered an amendment to add $44.7 million to the renewable energy research and development account.
Adopted 214-208 on July 12, 1995.
PUBLIC INTEREST VOTE: YES

15) Oppose Investor Rights Rollback (12/20/95)
Consumer Protection Campaign
Motion to override President Clinton's veto, and enact into law, H.R. 1058, the Securities Litigation Reform Act, sponsored primarily by Reps. Cox (R-CA), Tauzin (R-LA), Fields (R-TX) and Bliley (R-VA). The new law makes it nearly impossible for defrauded investors to recover their losses in investment swindles, broadly immunizes accountants, lawyers and companies for their complicity in financial frauds, and fails to fix recent anti-investor decisions of the courts.
Adopted (2/3rds required to override veto) 319-100 on December 20, 1995.
PUBLIC INTEREST VOTE: NO

16) Oppose Product Safety Rollback (3/10/95)
Consumer Protection Campaign
Passage of H.R. 956, which would encourage the manufacture of defective products and restrict the legal rights of victims in all civil lawsuits, including not only product liability victims but also victims of medical malpractice and drunk drivers. The bill discriminates against women, children and the elderly by restricting non-economic damages, or pain and suffering, awards. It also unfairly repeals pro-consumer state laws, but allows anti-consumer state laws to stand.
Adopted 265-161 on March 10, 1995.
PUBLIC INTEREST VOTE: NO

17) Oppose Patient Rights Rollback (3/9/95)
Consumer Protection Campaign
During consideration of H.R. 956, legislation restricting the rights of product liability victims, Rep. Cox (R-CA) proposed an amendment to extend the bill's $250,000 cap on non-economic damages to medical malpractice claims. These awards for pain and suffering generally compensate victims who are maimed, paralyzed, blinded or disfigured.
Adopted 247-171 on March 9, 1995.
PUBLIC INTEREST VOTE: NO

18) Oppose Campus Gag Rule (8/3/95)
Higher Education Campaign
Rep. Solomon (R-NY) introduced this amendment to the 1996 education spending bill (HR 2127) in an effort to silence student groups and activism on college campuses. The amendment would have denied federal funds to colleges and universities where student groups used student funds for any activity which might "influence public policy." This amendment was an attack on student rights and free speech, and represented new levels of federal intrusion into campus activities. This amendment was opposed by thousands of

educators, college presidents, education associations, student groups and public interest organizations.
Rejected 161-263 on August 3, 1995.
PUBIC INTEREST VOTE: NO

19) Oppose Student Loan Cuts (8/3/95)
Higher Education Campaign
This education spending bill slashed over $4.5 billion from education, the largest education cuts in history. The bill included $700 million in cuts to student aid, eliminating State Student Incentive Grants, the Perkins Loan Program, and Harris and Javits graduate fellowships. In addition, the bill contained legislative riders that would have crippled the Direct Student Loan Program. These riders were supported by banking interests in an effort to maintain taxpayer giveaways to the banks that operate the old student loan program.
Adopted 219-208 on August 3, 1995.
PUBLIC INTEREST VOTE: NO

The Source

THE CAMPUS WOMEN'S CENTER FEB / MARCH 1996

* * * *

The Difference Between Ignorance and Apathy?
Students don't know . . . Students don't care
by Jennifer Axen

The results of the UCLA Annual National Freshman Survey indicate that political interest among college students is at an all time low; recent articles running in the campus dailies have done nothing to disprove these numbers. Headlines such as "College students, politics don't mix," and "Student Voter Apathy Rampant," help console UW-Madison students that they are not alone in their current political unconcern.

Many contend that the weak political involvement of today's youth is not born out of laziness nor ignorance, but rather is a symptom of a greater disillusionment: a reaction to a system that has failed them. As Bernard Friedman, Opinion Editor for the Badger Herald writes, "There is a reason that a large percentage of today's youth are just saying no to politics...It is because the current political landscape is not a very friendly place."

Friedman does have a point. Politics aren't always *friendly*, just as feminism isn't always *sexy* and reality isn't always all that comfy. Still, this seems a fruitless attitude to take at the onset of an important political season and upcoming election year. Closer yet, is the legislation pending

on campus which threatens to cut vital funding from student organizations.

The Source
The Campus Women's Center
710 University Avenue, Suite 202
Madison WI 53715
(608) 262-8093 or 262-5731

The Source is a bi-monthly newsletter published by Campus Women's Center. The CWC encourages all women to voice their concerns. Essays, articles, creative writing and artwork are welcomed. All submissions, advertising and letters you wish to be considered, must be formatted onto a Macintosh initialized disk and sent to: Jennifer Axen, Publicity and Newsletter Coordinator c/o The **Campus Women's Center**. The Campus Women's Center is a non-partisan, not-for-profit organization. Opinions expressed in The Source are those of the contributors and do not necessarily reflect those of the collective.

These are issues that directly impact all of us: as women and men, as members of this community and of this nation. We do not stop being citizens because we are students. As voting-age adults we must recognize our potential in shaping political discourse. As students of a major university we must recognize our privileged position and "build a bridge back," to those not afforded the same educational opportunities. Finally, as women we must distinguish ourselves as *agents*, instead of victims, with the power to *act*, rather than be acted upon.

In an age where women and minorities continue to be systematically excluded from politics, both in representation

and position. I am proud to publish the words of those who have refused to relax their integrity. The women who contributed to this issue of The Source, stand as shining examples of those who refuse to soft-pedal their voices - even when traversing the most unreceptive ground. ♀

* * * *

Legislative Update

Wisconsin State Legislature:
We've Got Your Number
by Amalia Vagts

The Wisconsin State Legislature is currently debating the "Informed Consent" bill (Assembly Bill 441). Amendments to AB 441 passed in the Assembly last September. At press, the bill is being held in committee and is expected to be debated on the Senate floor in March. This bill is unnecessary, biased and forces medical providers to share state-mandated propaganda with their patients.

AB 441 has been labeled the "Informed Consent" bill because the authors declare their intent is to provide a woman with all the necessary information before she chooses to have an abortion. The bill has also been called the "Women's Right to Know" and the "24-Hour Waiting Period," because it imposes a 24-hour waiting period for all women before an abortion can be performed. The bill is not limited to a waiting period, however. It also includes several stipulations which create further roadblocks to a woman's constitutional right to an abortion.

Under current Wisconsin law, a physician or assistant must provide a woman with the following information before obtaining an abortion: whether or not she is pregnant, how far along her pregnancy is, availability of agencies and services

to provide birth control, as well as pre-natal and post-natal care (if she decides to continue the pregnancy), the availability of services to help a minor obtain consent (if the client is a minor), and any associated risks with the pregnancy and the abortion technique to be used. After this, the woman must sign a form that she has been provided with the above information and consents to the abortion.

AB 441 expands and modifies the requirements for this physician-patient discussion. A complete list of the steps can be found in the bill itself, but some of the more provocative stipulations are as follows. First, the physician or assistant must show the woman a 20-page colored photo booklet that describes the characteristics of the fetus and offers information regarding alternatives to abortion. Furthermore, the woman must be told she can have an ultrasound, that prenatal benefits exist under medical assistance, and that the father must provide child support. In essence, the woman is made to feel as if her decision is wrong, based on words that legislators have demanded by law to be placed in the mouths of medical providers. Any doctor who disobeys this law could be fined, imprisoned, or both.

So what does all this mean for Wisconsin women? Some people argue that a 24-hour waiting period is not a terrible thing. Abortion is a big decision, they say, and one that should be well thought out. But certainly any women, when she determines she is pregnant, has thought of nothing else than what she will do. An imposed waiting period is a roadblock, not a decision-making time. Furthermore, although the waiting period may logistically be 24 hours, it will likely become one or two weeks before a woman can schedule the second appointment. This will cause later, not fewer abortions. In addition to these facts, because of the shortage of abortion providers, a woman must already wait about six

days to have an abortion. A waiting period can become the difference between choice and no choice to a woman who must take time off from work, obtain transportation, and find child care for other children.

We all want to reduce abortions. At the same time, however, abortion must continue to be a safe and legal reproductive choice for women. AB 441 is not about helping women. The bill allows for NO exceptions and does not leave any room for individualized care. There are no exceptions for survivors of incest, sexual assault, or even for women who are carrying severely deformed fetuses. This bill has no concern for women who are facing an extremely difficult decision.

Some people say the only thing pro-choice and anti-choice people have in common is their desire to decrease abortions. I agree. This piece of legislation, however, makes me question if that is really the anti-choice movement's goal. Rather than causing fewer abortions, a waiting period is more likely to cause later and more dangerous abortions.

We must act now to block this bill. You can obtain a copy of the bill at the Legislative Reference Bureau. Familiarize yourself with its contents and get prepared to defend women's rights to reproductive choice when the bill hits the Senate floor in March. For more information or to find how you can become further involved, contact Jennifer at the Campus Women's Center: 262-8093. ♀

Keeping a Mindful Eye
by State Representative Tammy Baldwin

The beginning of 1996 marks the "beginning of the end of the 1995-96 legislative session." The State Assembly has two major (and two minor) floor periods remaining before it adjourn in preparation for summer and fall campaign activity. The first lengthy floor period begins March 5th and ends March 28th. In between, Assembly and Senate committees will be meeting furiously to complete action on pending bills prior to the looming deadlines.

Typically, the January floor period presents one of the last opportunities to push forward significant or controversial legislation. Any major proposal that has not made it though one house or the other by the end of January, is unlikely to be passed into law this session.

From a partisan perspective, the first few months of 1996 will provide the last chance for the respective political parties to craft and refine the political messages they intend to take into the 1996 partisan elections. For those reasons we can expect the winter and spring political session to be lively and contentious.

Several controversial bills that have significant impact on women in Wisconsin are expected to advance in the Legislature over the next few months. They include: AB 591 — a welfare reform bill known as Wisconsin Works (W-2) designed to replace AFDC with a mandatory work program and AB 200 — a bill which "federalizes" Wisconsin's landmark Family and Medical Leave Act, thus repealing several of Wisconsin's stronger work protections. The following is a brief description of each of these controversial bills.

The W-2 program is intended to replace the current AFDC program. Unlike AFDC, W-2 is not an entitlement program. W-2 participants will be placed in one of four levels of work experience. They are: W-2 Transitions - compensated at 70% of the minimum wage; Community Service jobs - compensated at 75% of the minimum wage; Trial Jobs (subsidized employment) - compensated at the minimum wage; or unsubsidized employment - compensated at market wages. Most participants will not be eligible for unemployment compensation laws. Many participants also will not be eligible for the Earned Income Tax Credit.

A mother will likely be required to participate when her youngest child reaches 12 weeks of age. Unlike AFDC participants, a W-2 may not pursue higher education as a part of the program. This is true despite the fact that education is the most effective way to permanently lift families out of poverty. Child care and health care are available to W-2 participants with a mandatory co-pay. Other child care provisions cut off child care subsidies when a child reaches the age of 10, even though it is considered neglect to leave a child under the age of 13 unsupervised.

The bill, as drafted, leaves many questions unanswered and has drawn much criticism. Child care advocates have asked: What happens to a W-2 participant who cannot locate safe childcare? Who pays if the state allocates insufficient funding for childcare? Low income families have asked: why were poor families not invited to participate in the formulation of this program? What safety net exists for children if adults in the family are not able to meet the W-2 requirements?

The W-2 Bill (AB 591) is currently in the Jt. Finance Committee. That Committee has pledged to try to address some of the proposal's problems. While I think we can expect some improvement to be made in Committee, I remain fearful

that W-2 will worsen poverty for mothers and children rather than lessen it.

The Family and Medical Leave Act revisions (AB 200) are also a great concern to many working women and men. Wisconsin passed one of the nation's first Family and Medical Leave acts, permitting workers to take unpaid leave from their jobs for up to 12 weeks for certain purposes without fear of losing their employment. The permitted purposes include caring for a sick or injured spouse, parent or child or adopting or giving birth to child. These laws disproportionately benefit working women, who are often the ones called upon in their families to take on these care-taking roles.

Several years ago, the Federal Government passed its version of the Family and Medical Leave Act. Many of the Federal provisions are weaker than those found in Wisconsin's law. AB 200 proposes to adopt the federal law in place of our own stronger statutes. The effect of "federalizing" the Wisconsin Family and Medical Leave Act will be that fewer employers will be governed by the law and fewer employees (especially part time employees) will be covered by the law.

I have been working for the defeat of AB 200, or in the alternative, a compromise which would take the best provisions from Wisconsin law and the best provisions from the federal law and combine them. The bill could come to the floor of the Assembly any time this winter or spring.

This is certainly a time for students as concerned citizens to keep a close eye on state government. As the end of the session draws near, proposals are likely to move swiftly with less than optimal time for discussion and reflection. I invite you to keep in touch with me on issues of concern to you. You can reach me by phone at: 266-8570 (w) or 241-6675 (h); by E-mail at: uswlsa78@ibmmail.com; or drop by my office in Room 412 - North at the State Capitol. ♀

CAMPUS WOMEN'S CENTER "THE SOURCE"
MAY 1996

Legislative Update

"From the Capitol . . ."
by Amalia Vagts
Community Organizer
Planned Parenthood of Wisconsin

It wasn't exactly a good month for women in the Wisconsin Legislature. The last Legislative Update in *The Source* gave you an introduction to Assembly Bill 441, the so-called "Woman's Right to Know" bill, which has been approved by both the Senate and the Assembly. AB 441 now heads for the Governor's desk.

The Bill underwent a few changes on its journey through the Legislature. In the Senate, Senator Mary Panzer (R-West Bend) drafted an exception for cases of rape and incest, which was approved by a 17-16 vote. Other woman Republican Senators, Joanne Huelsman (R-Waukesha), Albert Darling (R-River Hills), and Peggy Rosenzweig (R-Wauwatosa) proposed modifying amendments to the bill. Each of these Senators opposed the final bill. There was also an amendment to delete the minimum punitive damages to physicians for non-compliance. It was later changed to a minimum $1000 penalty.

AB 441 then returned to the Assembly for a vote on the bill as amended. Representative Glenn Grothman (R-West Bend, co-author of AB 441) drafted a substitute amendment to replace the Senate's rape and incest exemption. This amendment kept the information requirement for all women seeking an abortion, eliminated the waiting period for cases of forcible rape and reduced the waiting period to two-hours for cases of incest where the victim is a minor. In addition,

the woman must file a police report of the forcible rape or incest and this report must be confirmed by law enforcement authorities before the abortion is performed. Complying with the mandate that the woman has filed a report could take hours, days or weeks. Therefore, the exemption is not truly an exemption at all.

This version of AB 441 returned to the Senate where it narrowly passed (17-16) and awaits action by the Governor. He may choose to sign or veto the bill. He may also choose not to sign the bill — the bill still becomes law, but without his support.

Some people are very concerned with the implications of this bill. For instance, the bill provides a very narrow exception for life endangerment. It only allows exception if the woman will die or lose the use of a major bodily function within 24 hrs. If a woman is expected to die within 36 hours without an abortion, she is still subject to the counseling and waiting period. Another concern is there is not an exception for emergency contraception (like the morning after pill). Additionally, there is no right for the woman to decline or refuse the information that she must be given from the physician.

If enacted, this will be the most restrictive measure on a woman's right to reproductive freedom in the United States.

Please call or write the Governor to express your opinion on AB441. He needs to hear women's voices on this issue! His number is 266-1212, his address is State Capitol-115 East, Madison, WI 53702, and his email address is wiscgov@mail.state.wisc.us.

W-2

Both the Assembly and Senate approved W-2. Wisconsin's Welfare Reform legislation this month. State Representative Tammy Baldwin's article in last month's *The Source* described the program. As has been pointed out by many people, W-2 reduces child care, education subsidies and removes the safety net for Wisconsin's poorest and most vulnerable women and children.

Feticide

There was a public hearing early this month on a proposed feticide bill.. This bill establishes separate crimes and penalties for the death of a fetus through means other than a legal abortion (e.g. domestic battery, auto accidents). In many cases, these penalties are far more severe than those for abusing a woman. In Wisconsin, there is already a current feticide law which has serious consequences for intentional destruction of an unborn quick child (not abortion). This bill is the Wisconsin's Right to Life's response to the domestic abuse suffered by Tracy Black. Tracy Black was nine and 1/2 months pregnant at the time she was beaten by her husband to the point she lost her fetus. This bill goes too far. It defines life at the beginning of conception and establishes 20 separate penalties for a fetus. Instead of creating a new, anti-choice motivated bill, legislators could have strengthened the current law. At the hearing, Wisconsin Coalition Against Domestic Abuse, the Wisconsin's Women's Network, and Planned Parenthood of Wisconsin testified against the bill and the detrimental impact it would have on women.

Clinic Access

Hey there is some good news for women in Wisconsin! Senator Joanne Huelsman (R-Waukesha) and Representative Becky Young (D-Madison) have co-sponsored a bill that

would protect free access to medical facilities and impose penalties for trespassing and interfering with access to facilities. Currently, there are laws prohibiting interference with patients or staff members attempting to block a woman's access to health centers.

The Senate Judiciary Committee held a public hearing on the bill March 20th. Supporters of the bill were representatives of National Organization of Women. Planned Parenthood of Wisconsin, and Madison area clinics. Testifying in opposition were well known protestors Ralph Ovadahl, Matthew Trewella, and Monica Miller. The opponents claimed this bill violates their rights to peaceful, prayerful protest.

The Legislature finished their last major floor period on March 28th and will have a final minor floor period in May where they must make all decisions for the 1995-1996 session.

Is the Wisconsin Legislature reflecting your voice? ♀

The Same-Sex Marriage Debate Comes to Wisconsin
by State Representative Tammy Baldwin

The issue of marriage rights for gay and lesbian couples has interested glb (gay, lesbian, bisexual) activists for many years. However, mainstream discussion of the issue was rare until three years ago. That is when the state Supreme Court in Hawaii issued a decision stating that it was unconstitutional (violating the state's prohibitions on sex discrimination) for the state of Hawaii to deny marriage licenses to couples of the same sex. The Hawaiian Supreme Court said that unless the State could prove that it had "compelling" reasons to discriminate, it would have to permit same sex couples to marry. A trial is scheduled for August of this year on the

issue of whether Hawaii can demonstrate "compelling" reasons why marriage should only be between a woman and a man.

Legal experts appear to agree that the state will be unable to demonstrate "compelling" reasons and anticipate that Hawaii will begin to recognize same sex marriages within the next two years. Meanwhile these legal developments have caused a furor in the remaining 49 states. Over the past several months, bills have been introduced in 27 states, aimed at preventing recognition of same-sex marriages in those states, in the event that Hawaii begins to recognize such marriages. Of the 27 anti-same sex marriage bills that have been introduced around the nation, only four have been signed into law as of early April.

Wisconsin formally entered fray in the spring of this year. Groups from the Radical Religious Right began urging Republican lawmakers to introduce an anti-same-sex-marriage bill in Wisconsin. One lawmaker, Rep. Dean Kaufert, appeared interested in authoring such a bill in February, but changed his mind after seeking legal counsel and concluding that current law plainly disallows same-sex marriages.

However, in March, Rep. Lorraine Seratti took up the challenge of the Radical Religious Right and introduced an anti-same-sex marriage bill — Assembly Bill 1042. Her bill was referred to the Assembly Constitutional Law Committee.

Because Seratti's anti-same sex marriage bill was introduced so late in the session, it appears likely that the bill will die without a public hearing or vote, upon adjournment of the Legislature in May. I think it safe to assume, however, that this issue will be pressed even further when the Legislature returns in January.

In light of the prominence of the issue, it is important to consider the reasons against hastily adopting anti same-sex

marriage legislation. Legislation banning recognition of same-sex marriages will preclude the substantive debate that this state out to have on the issue. But perhaps more importantly, a bill to bar recognition of gay and lesbian families will be divisive in our state, pitting various constituencies and interest against one another, who would otherwise be engaged in useful and meaningful discussion. Finally, one has to be concerned with another consequence of this type of legislation. Whenever persons in positions of authority promote disparate and unequal treatment of individuals in society, they are implicitly condoning such conduct by private citizens. Throughout the country, wherever anti-gay and lesbian legislation or ballot initiatives have been pursued, we have experienced a rise in hate crimes and violence against gays and lesbians. I don't want to see that happen in Wisconsin, but I fear it will.

I believe that there is one issue upon which we should all agree. The issue of same-sex marriage deserves a fair and informed public debate. We need to understand specifically what rights and responsibilities marriage confers. We need to understand the struggles that gay and lesbian families face when they don't have access to legal protections. And we need to enact public policy which is not based on fear or hate, but policy which is based on principles of fairness and justice. Wisconsin citizens deserve no less. ♀

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THIRD ANNUAL GAY AND LESBIAN FILM FESTIVAL

THURSDAY APRIL 17

GIRL'S NIGHT OUT: The festival kicks off with a barrage of girl's shorts. Leading the way is Pratibha Parmar's stunning and celebrated KHUSH which examines the eroticism of being queer and colored in Britain and India (where homosexuality is still illegal). The classic DAMNED IF YOU DON'T follows, chronicling a young nun's struggle with her desires in a tale that is part seduction, part comment on repression and fantasy. After; the heat turns up with underground filmmaker Arlene Sandler's FROM BEJING TO BROOKLYN and THE MULBERRY BUSH. Militant anti-porn feminist Bernice-Be-Good battles it out with a band of proud sex workers and their pussy-powered Kung-Fu in BEJING while Viva Knival shows her off her sex-positive attitude with a host of Fischer Price toys in BUSH. The evening ends with a cinematic look back through THE MILLION EYES OF SU-MURU, This 60's British espionage/Kung-Fu flick depicts a world in which heterosex is illegal and the beautiful, sadistic Su-Muru and her cult of buxom amazons scheme to destroy mankind. Obviously, a must see.

THURSDAY APRIL 25

FOR THE BOYS: The lights go down and your life is emblazoned across the screen. We begin with BOYS/LIFE, director Philip Roth's look at growing up and jerk-off clubs; from there we move to TWIN CHEEKS: WHO KILLED THE HOMECOMING KING, a film which parodies David Lynch's cult TV series in explicit ways. After that, the animated QUEERDOM attempts to answer the age old question: What happens when a thick-neck jock wakes up feeling a little "queer"? PRAGUE follows, tracing a young man's painful letters to his soon-to-be-ex. RAISING NICHOLAS lightens the mood with a charming snapshot of a 7 year old Honduran boy and his adoptive parents. After; the evening gets more exciting with Michael Wallin's sexy THE PLACE BETWEEN OUR BODIES, a frontal shot back at sexual hunger in the decade before AIDS. THE DEAD BOYS' CLUB offers another look at the disco years through the story of one man's coming out and the generation that paved the way before him. Finally, the evening ends with a glance at the next generation in LIVE TO TELL: THE FIRST GAY AND LESBIAN PROM IN AMERICA, which chronicals the lives of those who made America's most tradition-bound coming-of-age-event their own.

Both nights begin at 8:00 pm and will be held in
the Fredric March playcircle, 2nd floor, Memorial Union,
800 Langdon Street. The films are FREE!!!

Made possible with the help of
the Campus Women's Center, the GLB Campus Center,
the 10% Society, and WUD

LGB Campus Center
Queer Campus News
December 1995

* * * *

Community announcements/call to action

Coming Out, Coming Together

Coming Out, Coming Together is an interfaith organization of faith communities that are supportive of gay, lesbian, bisexual, and transgender persons. In the past three years, Coming Out, Coming Together has held interfaith services celebrating Coming Out Day, invited the LGBT community and their friends to the worship services of the churches and temples represented, and encouraged participation by religious groups in the Gay Pride march.

With an expanded network, its activities might include attending events where homosexuality is being challenged on religious grounds or providing resources on issues of faith and sexual orientation to the community.

However, the organization's purpose and mission statement are up to YOU. Coming Out, Coming Together invites lesbian, gay, bisexual, and transgender persons and their heterosexual allies to join. Coming Out, Coming Together also encourages supportive faith communities, individuals within faith communities that are not currently affirming of homosexuality, and persons unaffiliated with any faith community to become part of this organization.

There will be a retreat on January 21, from 2:00-5:00 to begin talking about what a year-round Coming Out, Coming Together might look like. If you are interested, please call Joan Downs at 257-0106 (home phone) and leave a message. She will return your call with additional information.

Integrity/Dignity

Integrity/Dignity of Madison is a gathering of gay, lesbian, bisexual and transgendered Catholics and Episcopalians, and their friends, as well as a large number of folks from a wide variety of denominations. The group meets twice a month for a liturgy to fulfill the spiritual needs that we all have, often because our home parishes and churches do not meet these needs.

Everyone is welcome regardless of religious background or sexual orientation. We meet at 7:30 PM at Saint Francis House, 1001 University Avenue in Madison on the second and fourth Sundays of each month. We also have other spiritual and social activities on other Sundays or other days of the week.

On Sunday, December 10, is another regularly scheduled liturgy. The following Saturday, December 16, is our annual Christmas potluck at Jim Green and Bill Diederich's home, 837 N. Gammon Road, Apt. G, Madison. Dinner begins at 6:00 PM. Please bring a yummy dish to pass. We won't meet after that until the new year. Sunday, January 14, 1996, will be our regularly scheduled liturgy. If you have any questions about these events, need directions, or just want more information about I/D, please call Jim or Bill at 608-836-8886. We look forward to seeing you!

Action Wisconsin

Action Wisconsin is the only statewide GLBT political organization. Everyone interested in fighting for gay, lesbian, bisexual, and transgendered rights needs to be a member. We have hundreds of members, but plan to have thousands, and

need the energy and work of everyone committed to our agenda in the state.

Our top priority items are family recognition, HIV issues, youth issues, fighting the radical right, and protection and expansion of GLBT civil/legal rights. We are organized in every region of the state and need YOU to keep moving forward.

Visible, effective participation in the 1996 election season is our top ACTION priority now. We are also working on a major Get Out the Vote campaign.

If you are not already a member, call 608-231-1099 to JOIN NOW. If you are a member, get involved in the political ACTION agenda. Be a part of Wisconsin's GLBT power.

Conference aims at bringing together activists nationwide

by Alice Leibowitz

The National Gay and Lesbian Task Force, the nation's second largest lesbian, gay, and bisexual rights organization, sponsored their eighth annual Creating Change Conference in Detroit this past November 8-12. Five Madison activists attended: Tammy Baldwin, state representative; myself (Alice Leibowitz), Assistant Director of UW's LGBCC; Sandee Janagold, Director of the United; Greg Hines, President of the Board of Directors at the United; and Scott Seltzer, United volunteer and legislative aide to Tammy Baldwin.

The Creating Change Conference is an exciting place. For one thing, I had many brushes with fame. I talked with John D'Emilio, author of *Sexual Politics, Sexual Communities*, Alan Berube, author of *Coming Out Under Fire*, and Melinda Paras, Executive Director of the National

Gay and Lesbian Task Force itself. Berube and Paras are both interested in speaking at UW-Madison sometime in 1996.

It was also exciting to learn about national political campaigns firsthand from the individuals who are leading them. Same-sex marriage may be legal in Hawaii by early 1997. The U.S. Supreme Court has already finished deliberating the case of Colorado's Amendment 2 (which prohibits legal protection of gay people's rights). There is a drive to register LGB citizens to vote in 1996 primaries, with the hope that we may become a powerful minority voting bloc, as black people became in the 60's.

Many speakers pointed out the connection between the LGB equal rights movement and other progressive movements for social change. Melinda Paras made the point that all movements of disenfranchised groups work toward fairness, whatever that means to the particular group. For the physically disabled, that means good parking spaces; for the black movement in the South in the 50's and 60's, it meant desegregation; for our movement it means equal benefits for domestic partners. One speaker pointed out that AIDS activists and welfare activists have a shared issue in fighting Medicaid cuts, since many people with AIDS rely completely on Medicaid for their health care.

Issues of inclusion were brought up again and again, issues which are relevant at the national level but also in Madison. Black, Hispanic, Asian, and Native American speakers, presenters, and participants spoke about their needs. It was suggested that in order to racially integrate the movement, white gay activists must help primarily straight minority activist groups. There was a very strong transgender presence. The International Foundation for Gender Education kept a literature table, sold "Transsexual Menace" tee-shirts, and presented a workshop on issues of transexuality and

cross-dressing. Youth inclusion was highly emphasized. Several hundred under-21 participants and their allies encouraged both youth-specific groups and services, and the inclusion of youth in primarily adult organizations. The bisexual caucus, as in years past, was large and friendly. We wore blue makeup one day as a show of visibility and solidarity.

I found myself, hundreds of miles from home, networking with other Madison activists with whom I had had little previous contact. I chatted with Tammy Baldwin, who reassured me that the state legislature has no immediate plans to erode the rights of LGB people, although they may or may not improve. Over Chinese food, Sande Janagold and I discussed possible areas of collaboration between the United and the LGBCC. These conversations filled me with a sense of collective strength.

Clearly, the strongest message of the conference was that all the activists attending, and thousands of others, were the brilliant, dedicated people who make up America's lesbian, gay, and bisexual movement. Each time someone in the audience of a workshop gave me great advice, and each time a plenary speaker asked us to applaud for ourselves, I realized in my heart that we are the movement.

Maine Didn't Discriminate

by Kristin Davis

What do you think of when I say "Maine"? Lush forests?? L.L. Bean stores that are open 24 hours a day?? Duck boots?? Well maybe, but now I immediately associate Maine with anti-gay referenda. Like Colorado and Oregon, Maine too has been targeted by the radical right.

In the summer of 1995, I was accepted into an internship program through the Progressive Student Leadership Exchange (PSLE) to work against the Maine referendum that was titled "An Act to Limit Protected Classifications..," later known as Question One. Bruce Fein, a lawyer from Virginia, who constructed the wordy and difficult text for Amendment Two in Colorado, created the Maine referendum question to confuse voters. To summarize, the referendum asked if the people of Maine wanted to change existing and future laws with regards to 'protected classifications'. A 'yes' vote on Question One meant that the non-discrimination law in Portland would be overturned and the state of Maine would be PROHIBITED from EVER including sexual orientation in any non-discrimination laws. A 'no' vote on Question One meant that you wanted everything to stay the same.

An organization called Maine Won't Discriminate was formed to counter the referendum and hold ground for lesbian, gay and bisexual people in Maine. Maine Won't Discriminate had the support of many important people and organizations, including Governor Angus King, Senator Olympia Snowe, the Maine Council of Churches, Bath Iron Works (the largest employer in Maine), and The Roman Catholic diocese of Maine. This support and the constant hard work of staff and volunteers (about 3500 !!) led to the defeat of Question One on November 7th.

The final election results were 53 percent 'no' votes and 47 percent 'yes' votes. These numbers were a little too close for some community members, but we won. Hard work, blood, sweat and tears were all worth it; Maine Didn't Discriminate!

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Lesbian, Gay, Bisexual, and Transgendered Coming Out Series October 7-12, 1996

Coming Out Series '96

The Ten Percent Society, the Lesbian, Gay, and Bisexual Campus Center, and other campus organizations present: **Coming Out Week – '96,** a celebration of LGBT pride at the University of Wisconsin at Madison.

Rainbow Flags on Bascom Hill: Celebrating National Coming Out Day. Bascom Hill will be adorned with a magnificent Rainbow flag to symbolize gay pride. Look for the traditional pink triangles, as well as banners around other parts of campus. ***Monday, October 7 through Friday,***

October 11, 7am - 6pm. Bascom Hill. Sponsored by The Ten Percent Society.

AIDS in the 90's. This informative hour long session will deal with the latest research and current health guidelines concerning HIV/AIDS. Speakers from Madison AIDS Support Network and University Health Services will discuss the risks of oral sex, woman-to-woman transmission of HIV, and the different ramifications surrounding HIV testing. ***Monday, October 7, 7pm.*** Memorial Union (check *Today In The Union*). Sponsored by the Lesbian, Gay, and Bisexual Campus Center.

Town Hall Meeting: A discussion of LGB issues on the UW-Madison campus. Students who don't usually have a hand or a voice in UW-Madison politics are encouraged to attend this open forum on lesbian, gay, and bisexual identity and concerns on the UW-Madison campus. Lead by Tammy Baldwin. ***Tuesday, October 8, 7pm.*** Memorial Union (check *Today In The Union*).

Films:

- ***Beloved Murderer!*** - Two lesbian hit women are hired to bump each other off in this darkly romantic animated film noire. A beautifully animated mixture of desire and intrigue. *8 mins.*
- ***Black Hair and Black Eyed*** - From what sources does a young Korean-American woman draw her sense of identity? *Black Hair and Black Eyed* may raise more questions than it answers. In its own quirky way it asks questions that matter. *8.5 mins.*
- ***Homo Promo*** - This fast-paced overview offers a crash course in gay and lesbian movie history and a colorful look at the best (and worst) Hollywood

hard-sells of gay and lesbian "subject matter." *75 mins*.

- ***O Happy Day*** - *O Happy Day* imagines the early days of gay liberation for black gay men. It blurs the difference between the Black Power movement and the Gay Power movement, and instead focuses on the similarities between the two. *6 mins*.
- ***Out Loud*** - In nine installments, gay and lesbian teens discuss their hopes, fears, challenges and achievements in their own words, and with their own vision. *18.5 mins*.
- ***Want*** - *Want* is a hard-edge drama about self-hatred and repressed homosexuality. Two straight-seeming guys drive through gay neighborhoods shouting "faggots;" later, they return to their apartment, where one tries to suppress his sexual interest in the other. *13 mins*.

Wednesday, October 9, 7pm. Memorial Union Frederick March Play Circle. Sponsored by The Ten Percent Society.

Brenda Marston: *Documenting a Lesbian and Gay History.* Brenda Marston, curator of Cornell University's Human Sexuality Collection will talk about the importance of documenting lesbian and gay history and explain how this can be accomplished. ***Thursday, October 10, 4:30pm.*** Location to be announced. Sponsored by the Lesbian, Gay and Bisexual Alumni Council, The Ten Percent Society, and the School of Library and Information Sciences.

Day Savage: Savage Live! Dan Savage, sex advice columnist for *The Onion* newspaper, speaks about what it's like to be an out writer dealing with issues concerning people of all sexualities. Savage is known for his blunt style and sense of

humor. His column, *Savage Love*, is popular among all audiences and people will recognize him as the writer who makes his readers address him as "Hey Faggot" as opposed to "Dear Dan." ***Thursday, October 10, 7pm.*** Check *Today In The Union* or *The Onion* -exact location to be announced. Sponsored by the Lesbian, Gay and Bisexual Campus Center.

Library Mall Rally. Rally on Library Mall for Coming Out Day. Speakers will share their own or others' coming out stories. Rumor has it that Bucky Badger and a photographer will be there for those who wish to have their picture taken coming out with Bucky... ***Friday, October 11, Noon - 1:00pm.*** Library Mall. Sponsored by The Ten Percent Society.

Ten Percent Society Coming Out Week Dance. Celebrate Coming Out Day with your friends at the Ten Percent Society dance. DJ and cash bar. $3.00 at the door. ***Friday, October 11, 8:00pm - 12:45am.*** Great Hall, Memorial Union. Sponsored by The Ten Percent Society.

Lesbian Avengers' Dyke Dance. $5.00 at the door, $4.00 at A Room of One's Own bookstore. Open to all women. Contact The United (255-8582) for more information. ***Saturday, October 12, 9:00pm - 2:00am.*** 29 S. Mills St. Sponsored by the Lesbian Avengers.

Homecoming '96: Pride on parade! The weekend after Coming Out Week, interested persons will be meeting to create a homecoming float or banner for The Ten Percent Society. The homecoming parade will be the afternoon of Friday October 18. Contact The Ten Percent Society for more information. ***Saturday October 12 and Sunday, October 13; parade Friday, October 18. Time to be announced.*** Location to be announced. Sponsored by The Ten Percent Society.

A presentation of:

- **The Ten Percent Society**
- **Lesbian, Gay and Bisexual Campus Center**
- **Lesbian, Gay and Bisexual Alumni Council**
- **Lesbian Avengers**
- **School of Library and Information Sciences**

All events (unless otherwise noted) will take place in the Memorial Union at 800 Langdon Street in Madison. All events except the dances are free and open to all. Please check Today in the Union (TITU) for event locations. All events are accessible to people with disabilities and the hearing impaired. Please call 262-7365 at least one week prior to the event to request a speech interpreter. Please remember that the University of Wisconsin - Madison campus is smoke-free.



A PRODUCTION OF THE LESBIAN, GAY, & BISEXUAL CAMPUS CENTER

QUEER CAMPUS NEWS

OCTOBER 1996

UW—Madison celebrates National Coming Out Week

With National Coming Out Day this October 11, UW—Madison busts out the fun with a variety of events scheduled for that week.

From Oct. 7-13, the queer campus community will be filled with dancing, political activism, informational seminars and social events.

Most likely to be the largest attraction, Onion columnist Dan Savage will be speaking Thursday night at 7 p.m. Savage, author of "Savage Love," gives advice to those of all sexualities on sex and everything that comes with it.

Savage is known to all of his advice seekers for making them address him as "Hey Faggot," in contrast with other advice columnists like "Dear Abby." Savage aims at taking back the word from homophobes.

Also slated for the week, a program titled AIDS Information for the Nineties promises to discuss the latest in research, AIDS and lesbians, and facts one should know when getting tested. Panel members from University Health Services and Madison AIDS Support Network will give their presentations and open the floor for questions.

On Tuesday, a "Town Hall" meeting is scheduled for all students who want to voice their concerns on Madison's LGBT community. The event, which is sponsored independently of any organization, is aimed at hearing the

voices of all LGBTs, not necessarily those in the "loop of gay politics at the University.

The Ten Percent Society features its movie night on Wed. which includes a variety of shorts to make for a great evening. With films catering to everyone in the gay community, this popularly attended event promises "cleaner" footage this semester.

The second annual rally on liberal mall kicks off Friday at noon with a chance for LGBTs to get their picture taken with Bucky Badger next to the proverbial closet door. Bucky, who has remained silent in the past on questions regarding sexual orientation, will likely not use the event to make any such announcement.

That evening is TPS' Coming Out Day Dance in its usual location in the Great Hall of the Union. The cost is $3 and features a DJ, cash bar, and coat check (should the temperature be low enough).

Saturday is the Dyke Dance held at the Neighborhood house on Mills Street. Tickets are $4 in advance, $5 at the door.

Coming Out Week is a tradition started by TPS. This semester the LGBCC, the Lesbian Avengers, and independent students have taken part in scholarship.

* * * *

Bisexual Women's Meetings kick off this month

Beginning October 15 at 5 p.m., the Bisexual Women's Meetings will once again be getting together. This year the meetings are being held at the LGB Campus Center with the co-sponsorship of the Campus Women's Center.

"We are really hoping to expand awareness of bisexual women's issues and provide an outlet for women on campus to discuss their needs and concerns," Sara Braun, co-facilitator of the group, said.

Last year the group got together four different times with a good turn out for several meetings that were well publized.

"We're not trying to displace the function of By?Shy?Why? which meets on Monday night at the United, we're just trying to make an additional place for women to go near campus," Braun said.

The first meeting is set to go; participants should expect an informal atmosphere and good conversation.

ISO-MADISON HOME PAGE



Welcome to the ISO-Madison's home page. The ISO, or International Socialist Organization, is an organization of people who believe that most of the problems in the world today are directly caused or perpetuated by the capitalist mode of production, including: racism, sexism, environmental destruction, war, hunger, poverty, homelessness, and homophobia. Click here for a more detailed description of *where we stand*.

* * * *

WHERE WE STAND

Worker's Power

We stand for the principles of socialism from below - for the direct and democratic control of society by the working class.

Although workers create society's wealth, they have no control over its production and distribution. A socialist society can only be built when workers collectively seize control of that wealth and democratically plan its production and distribution according to human needs instead of profits.

The working class, both blue-collar and white-collar, is the vast majority of society and is the key to the fight for socialism. Liberation can only be won through the struggles of workers themselves, organized independently of all other classes and fighting for real workers' power.

We support trade unions as essential to the fight for workers' economic and political rights. To make the unions fight for workers' interests, rank-and-file workers must organize themselves independent of the union officials.

Revolution Not Reform

Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown.

The structures of the present government—parliaments, the army, the police and the judiciary—cannot be taken over and used by the working class. They grew up under capitalism and are designed to protect the ruling class against workers.

We do not support candidates of capitalist parties like the Democrats or the Republicans in the USA, the Liberals or the Tories in Canada, or the Liberals in Australia.

The working class needs an entirely different kind of state—a workers' state based on councils of workers' delegates and a workers' militia. These councils based on elected delegates from the workplaces and the neighborhoods will become the ultimate decision-making body in society. As in the Paris Commune and Russian Revolutions of 1905 and 1917, they will be organs of direct democracy whose delegates can be recalled by the electors. Combining political and economic functions, workers' councils will allow direct participation in the running of society by the working masses.

At most parliamentary activity can be used to make propaganda against the present system.

Internationalism

The struggle for socialism is part of a worldwide struggle. We campaign for solidarity with workers in other countries. We oppose everything that turns the workers of one country against those of another country.

We oppose imperialism and support all genuine national liberation movements. We oppose all immigration controls and policies which divide workers of different countries.

The experience of Russia demonstrates that a socialist revolution cannot survive in one country. China and Cuba, like the former Soviet Union and Eastern Bloc, have nothing to do with socialism. They are state capitalist regimes which oppress and exploit workers. We support the struggle of workers in these countries against the bureaucratic ruling class.

Full Equality and Liberation

Capitalism divides the working class—pitting sections of workers against one another, men against women, race against race, straights against gays and lesbians.

We oppose racism in all its forms. We support the right of aboriginal peoples, blacks and other oppressed groups to organize for their rights and in their own defense.

Black liberation, women's liberation and lesbian and gay liberation are essential to socialist revolution and impossible without it.

We fight for real, social, economic and political equality for women and for an end to discrimination against lesbians and gays, and youth. We support the struggles of all oppressed groups against any form of discrimination.

The Revolutionary Party

To achieve socialism, the most militant workers must be organized into a revolutionary socialist party to provide the political leadership and organization essential to a successful revolution.

The International Socialists/Socialist Workers Party are taking the first steps towards the building of such international revolutionary socialist parties—rooted in the workplace and able to provide political direction within the working-class movement. As revolutionaries, we help to build every struggle that strengthens the self-confidence, organization and socialist consciousness of workers and the oppressed. The revolutionary socialist party can only be built through the involvement of socialists in the daily struggles of workers and the oppressed.

We urge all of those who agree with our politics to join us in the struggle to build a revolutionary party.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE, and KEITH BANNACH,

Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR;
JONATHAN B. BARRY; JOHN T. BENSON;
BRIGIT E. BROWN; JOHN BUDZINSKI;
ALFRED S. DE SIMONE; LEE S. DREYFUS;
DANIEL C. GELATT; KATHLEEN J. HEMPEL;
RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH;
VIRGINIA R. MACNEIL; SAN W. ORR, JR.;
GERARD A. RANDALL, JR.; JAY L. SMITH and
GEORGE K. STEIL, SR., all in their official
capacities as members of the Board of Regents
of the University of Wisconsin System,

Defendants.

AFFIDAVIT OF RALPH OVADAL

STATE OF WISCONSIN)
) ss.
County of Green)

RALPH OVADAL, being duly sworn upon oath, hereby deposes and says:

1. I am a resident of Monroe, Wisconsin. I am a pastor of Christ the King Church in Monroe. I also host a radio and

television show in Milwaukee, and I lead an organization called Wisconsin Christians United.

2. On April 12, 1996 at 7:00 p.m., Scott Lively and I were scheduled to speak at a church in Madison named Trinity Evangelical Church at 401 North Lawn St. in Madison. It is a predominantly black evangelical church. Ron Green is the church's pastor. Scott Lively and I were going to speak on how homosexuality violates the teachings of the Bible and other related topics. This speaking event was advertised on the radio and through flyers distributed in the community.

3. At approximately 6:00 p.m. on April 12, 1996, about an hour before the speaking event was to begin at 7:00 p.m., pro-homosexual activists began assembling across the street to protest the speaking event. I estimate that protest group grew to approximately 400-500 people.

4. The pro-homosexual protestors outside the church banged on metal garbage can lids and chanted such things as "Queer Mob Rule;" "Hey Hey, Ho Ho, Homophobia's Got To Go," "Go Away," and "2, 4, 6, 8, We Don't Want Your Christian Hate." One lone demonstrator repeatedly shouted "Bring Back the Lions."

5. Some protestors carried large rainbow flags and signs with such statements as "Bigots Are Perverse,""Gay Love Is Divine," "Haters: Repent or Perish," "Hate Is Not A Family Value," "God Is Gay — He Loves Men," and "Madison: Hate Free Zone."

6. One of the signs read, "Don't Try to Hide Bigotry Behind a Cross — International Socialist Organization." I saw that sign clearly several times during the 2-3 hours that the protestors were at the church. A person from the church

videotaped the protest, and the sign of the International Socialist Organization appears in the video.

7. Between 6:00 p.m. and 7:00 p.m. on April 12, 1996, the group of protestors moved into the street toward the church where I was to speak. About 6 or 7 Madison police officers stood on the street between the church and the demonstrators. Many people who wanted to attend the meeting and hear me speak did not enter the church because the pro-homosexual protestors kept moving toward the front door of the church in an intimidating manner.

8. As this crowd moved closer and closer to the church building's front door, I invited some of the protestors to enter and listen to what Scott Lively and I had to say. We were going to allow in a small number of pro-homosexual activists, but they surged through the door in great numbers, pushing and shoving. The police discussed with me whether the meeting should be canceled. I would not agree to end it. The police said the fire code would permit only about 100 of the protestors to enter, and more protestors than that were trying to enter the building. With much effort, I was able to shut the doors and keep the rest of the protestors from coming in.

9. About 30-40 Christians and church members were inside the building to hear Scott and I speak, along with about 100 demonstrators. The demonstrators inside the church shouted obscenities and chanted loudly while I was speaking to the audience. The demonstrators made so much noise, it was difficult for people in the audience to hear me, even though I was speaking into a microphone. One woman stood up while I was speaking and shouted at me, "Fuck You."

10. After I had spoken to the crowd inside the church, I walked outside to speak to the protestors outside. Once again, I saw the large sign that said, "International Socialist

Organization." The protestors were yelling and were unruly. They threw rocks at the church building. Others entered the restrooms and urinated all over the floors. Some lesbians were eating fire, like people do at circus sideshows.

11. When the meeting was completed, the police officers would not allow us to leave unless we were protected by the police. At about 9:30 p.m., four police officers escorted me through the the back door. They placed me in an unmarked police car, and drove me to another location where my friends were able to meet me and drive me to the place where I was staying.

12. The crowd was very hostile and threatening during the time they were at the church. If the police had not been there, I would have feared that the protestors would have physically assaulted me.

/s/ Ralph Ovadal
RALPH OVADAL

Subscribed and sworn to before me this 2nd day of October, 1996.

/s/ W.J. Gillet
Notary Public

My commission expires on12/12/99.



Student Government Funds Radical Fundimentalists

For more information contact:
David S. Wilcox, Co-President
608.256.5017
dswilcox@students.wisc.edu

The Associated Students of Madison (ASM), UW-Madison's Student Government, has funded Chi Alpha, Christians in Action - a radical right-wing organization which preaches hatred of LGBT's and has been linked to anti-gay violence. The funding of this organization, by a vote of 9-8, is in direct violation of UW System Financial Policy and Procedure Paper #20 as well as the Establishment Clause of the US Constitution.

A Bio of Chi Alpha:

Chi Alpha, Christians in Action is a radical right-wing fundimentalist organization comprised of 15 members - four of which are students. The group is responsible for the well-known outdoor preachers which promulgate library mall at UW-Madison. These preachers openly advocate hatred of

LGBT's and are responsible for the distribution of hate literature around campus.

Their favorite targets for their literature are people attending meetings and events sponsored by The Ten Percent Society - UW-Madison's LGBT Student Organization. They attended several of the society's Coming Out Series events, verbally harassing approaching attendees - many of whom opted to leave.

ASM Funding:

ASM makes available "operations grants" to registered student organizations at UW-Madison. Chi Alpha, Christians in Action applied for this funding along with several other organizations. Two of the organizations, Asian Christian Fellowship and Chi Alpha, drew lengthy debate due to the religious nature of their organizations. In light of the Rosenberger v. U. of Virginia decision of the US Supreme Court, there was considerable confusion about how it applied to funding of religious groups at UW-Madison.

Asian Christian Fellowship got funded without desent. Three and a half hours of debate ensued surrounding whether or not to fund Chi Alpha. The majority of this debate centered around this organization's hate campaigns and their connection to gay bashing. In the end, with a vote of 9-8-2, ASM funded them.

Ramifications:

While the Supreme Court decision says that you cannot deny funding solely on religious grounds, this does not apply to the funding of activities which can be construed as preaching or direct proselytising (recruiting) - activities which Chi Alpha practice on a regular bases. To this end, The Ten Percent Society has filed a complaint with the Student Judiciary asking that this funding decision be overturned.

On a much more dire note, this funding sends a loud message that it is acceptable for groups to discriminate against, harass, abuse, and humiliate other members of the University community. A message that is contrary to Wisconsin State Law, University policy, and common morality. To this end The Ten Percent Society has filed 9 complaints against Chi Alpha for various violations of University policy. As a result, the group has been suspend and as such no longer exists as a Registered Student Organization at UW-Madison. This minor victory eliminates their funding for now, but the issue will be back when the members of Chi Alpha re-register under a new name and try again.

What next?

Well, this group will certainly be back requesting funding again next year. The names and email address of those ASM members who supported Chi Alpha follow. We encourage you to email all of them expressing your extreme displeasure at the funding of hate and discrimination.

ASM members voting to fund Chi Alpha:

John Nels Bjorkquist
Anne Davini
Shira Diner
Jan Ekholm
Clayt Freed
Craig Newby
Sam Sager
Jon Schoonmaker
Angela Vaughan

Thank you for your attention to this attack on LGBT rights.

Full-Time Segregated Fee Dollar Distributions
First Semester 1995-96

Health:	$79.34	The University Health Service portion of the segregated fees supports the clinical medicine, health education, and public health missions of the student health service.
Union:	$46.51	This portion of the segregated fees supports the facilities and programs of the Wisconsin Union. This involves the Memorial Union and Union South and extensive social and cultural programming.
GSSF:	$13.42	General Student Services Fund provides support for an array of services for students at UW-Madison. Examples include GUTS/HASH Tutorial, the Student Tenant Union, the Community Law Office, Campus Women's Center. SAFERIDE bus, and WLHA Student Radio.
System Audit Liability Fee:	$8.20	Pursuant to a Legislative Audit Bureau review, the 1985-87 State of Wisconsin Biennial Budget allocated auxiliary reserve balances from other UW System campuses to the benefit of the UW-Madison. Repayment is taking place over a period of ten years through funding from this segregated fee.
Intramural:	$7.78	This portion of the fee provides funding for the programs and facilities

		operated under the Division of Recreational Sports General Programs budget. Major facilities supported in this budget include the Southeast Recreational Facilities (SERF) and the Natatorium.
CCTAP:	$4.76	Child Care Tuition Assistance Program portion of the segregated fee provides tuition grants to students with children to pay for child care costs.
Student Gov't. Activity:	$4.28	The Associated Students of Madison portion of the segregated fee supports the operation of the UW-Madison student government association and other student group funding that is distributed by ASM.
United Council:	$.75	This fee supports representation activities by the United Council of Student Governments of UW system institutions. Although strictly not a segregated fee, it is assessed with the segregated fee group but at a flat rate of $.75 per student without regard to credit load.
WISPIRG:	$.71	A student group activity involved in a variety of public policy issues and supported by a portion of the segregated fee.

Full-Time Segregated Fee Dollar Distribution
First Semester 1996-1997

Health:	$85.39	The University Health Service portion of the segregated fees supports the clinical medicine, health education, and public health missions of the student health service.
Union:	$48.64	This portion of the segregated fees supports the facilities and programs of the Wisconsin Union. This involves the Memorial Union and Union South and extensive social and cultural programming.
Bus Pass:	$20.08	Provides a free bus pass for each student on all non-campus Madison Metro Transit System bus routes.
Intramural:	$10.89	This portion of the fee provides funding for the programs and facilities operated under the Division of Recreational Sports General Programs budget. Major facilities supported in this budget include the Southeast Recreational Facilities (SERF) and the Natatorium.
System Audit Liability Fee:	$8.12	Pursuant to a Legislative Audit Bureau review, the 1985-87 State of Wisconsin Biennial Budget allocated auxiliary reserve balances from other UW System campuses to the benefit of the UW-Madison. Repayment is taking place over a period of ten years through funding from this segregated fee.

GSSF: $6.48 — General Student Services Fund provides support for an array of services for students at UW-Madison. Examples include GUTS/HASH Tutorial, the Student Tenant Union, the Community Law Office, Campus Women's Center, SAFERIDE bus, and WLHA Student Radio.

Student Gov't Activity: $4.63 — The Associated Students of Madison portion of the segregated fee supports the operation of the UW Madison student government association and other student group funding that is distributed by ASM.

CCTAP: $4.56 — Child Care Tuition Assistance Program portion of the segregated fee provides tuition grants to students with children to pay for child care costs.

United Council: $.95 — This fee supports representation activities by the United Council of Student Governments of UW System institutions. Although strictly not a segregated fee, it is assessed with the segregated fee group but at a flat rate of $.95 per student without regard to credit load.

WISPIRG: $.71 — A student group activity involved in a variety of public policy issues and supported by a portion of the segregated fee.

University of Wisconsin System
Segregated Fee Allocations
By Institution-Fiscal Year 1995-96
University of Wisconsin-Madison

Organization	$Allocation
Student Services Finance Committee-Admin	8,400
Student Services Finance Committee-Unallocated	11,051
SAFEride Bus	165,000
Community Law Office	10,435
UW Greens	6,905
GUTS	56,342
Madison AIDS Support Network	26,070
Men Stopping Rape	20,136
Lesbian, Gay & Bisexual Center	22,042
Radio Station	481,673
Rape Crisis Center	27,101
Student Leadership Program (SLP)	12,815
Adventure Learning Program (ALP)	13,050
Student Tenant Union	33,340
U.S.S.A.	38,000
Vets for Vets	7,640
Campus Women's Center	34,200

1995-96 ASM Grant Allocations

1995-96 Associated Students of Madison Grant Allocations

Travel Grants	Travel/Con-ference Title	Student Organization	Amount Approved
	Alpha Kappa Alpha Regnl Conf	Alpha Kappa Alpha	325.00
	Amnesty Intl Conference	Amnesty Intl	330.00
	Midwest Asian American S U	AASU	150.00
	Alma Highland Festival	Scottish Highland Dancers	155.00
	ABA-Indian Law Section	ILSA	400.00
	Student Pugwash Conference	UW Student Pugwash	168.00
		Total	**1528.00**

Event Grants	Event Name	Student Organization	Amount Approved
	Fiesta Hispana	Bolivian S A	$550.00
	Cinema of Indonesia	Permias	$2,420.00
	Movie Showings	CIU	$300.00
	Dance Parties	CIU	$325.00
	China's Polit Reform	CIU	$600.00
	Ehrenreich Lect	New Prog Party	$2,000.00
	Keeping Time-Film	Keeping Time	$1,400.00
	Michael Parenti Lecture	CALA	$1,300.00
	Melange A' Trois	Red Ant Theatre	$925.00
	Fall Film Series	Mad Film Forum	$958.00
	Affirm Action Debate	Federalist Society	$338.00
	Tort Reform Debate	Federalist Society	$338.00
	Bldg Unity Thru Diversity	Multicul Mural	$7,000.00

	Youth In Action	SLAC, TAA, etc...	$2,000.00
	Latin American Music Fest	Songo	$600.00
	College Bowl Tournament	College Bowl	$825.00
	Beautiful Bridges	Brazil S A	$3,000.00
	Lesiea Newman	LGB Center	$1,000.00
	Turkish Independence Day	MTSA	$1,400.00
	William Appleman Williams	Greens	$1,400.00
	Economic Democracy	WCCN	$1,000.00
	Oigong Day	Oigong	$825.00
	Paul Siegel	10% Soc	$500.00
	Chinese Constitution	CIU	$370.00
	Wake Up Little Susie	WUD	$1,160.00
	Million Man March Video	WBSU	$150.00

	Take Back the Night Rally	TBTN Coalition	$459.00
	Greek Jews of WWII	Hellenic Society	$350.00
	Day of the Dead Celebration	MeChA	$1,400.00
	Prospects Peace in Balkans	Bosnian Relief Comm	$1,283.00
	Hispanics for Wilson	La Colectiva	$727.00
	Goodman and Pinto	ETAN	$1,363.00
	Asian Fashion Show	LAOS	$720.00
	Chinese Spring Festival	CIU	$840.00
	Coming Together Peoples Cor	ILSA	$2,270.00
	Juan Williams	Civil Rights Def	$2,500.00
	Black History Program	AKA	$3,145.00
	Silent Film Festival	WUD-Film	$580.00

	Winter Carnival	WUD-All	$5,518.00
	Winter Carnival	WUD-ALL	$400.00
	Race, Gender, and History	WHC	$925.00
	Sneaky Pitch	UTAA	$740.00
	Seung Hwa	WUD-Perf Arts	$2,250.00
	Eid Mela	Pakistani SA	$1,525.00
	Di Lop Churn	AASU	$1,373.00
	Jamez Chang	AASU	$473.00
	All Nations Pow Wow	Wunk Sheek	$1,352.00
	ASA Symposium	ASA	$972.00
	Law Revue	Stuart Law Revue	$500.00
	Women's Law Conference	WLSA	$3,000.00
	Foreign Affairs Forum	Pi Sigma Alpha	$535.00
	Sitar Concert	India S A	$549.00
	Feingold	Pre-Law Society	$210.00

	Human Rights in Tibet	Amnesty Intl	$250.00
	Yuri Kochiyama	AASU	$600.00
	Reggae Series	WUD-MUME	$1,500.00
	La Mujer Latina	La Mujer	$1,902.00
		Total	**$72,893.00**

Operations Grants	**Group Name**	**Amount Approved**
	ADDRESS DIVERSE VIEWS AND NOTIONS THROUGH COOP ED	$550.00
	AFRICAN STUDENT ASSOCIATION	$420.00
	AMERICAN INDIAN SCIENCE AND ENGINEERING (THE)	$700.00
	AMERICAN INDIAN SCIENCE AND ENGINEERING (Travel Grant)	$500.00
	AMERICAN NUCLEAR SOCIETY	$220.00
	AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS	$300.00

	AMERICAN STRING TEACHERS ASSOCIATION	$250.00
	AMNESTY INTERNATIONAL	$685.00
	ART HISTORY GRADUATE FORUM	$200.00
	ASIAN AMERICAN STUDENT FORUM	$200.00
	ASIAN AMERICAN STUDENT UNION	$700.00
	ASSOCIATION OF WOMEN IN AGRICULTURE	$300.00
	ASSOCIATION VENEZOLANA	$165.00
	BABCOCK HOUSE COOPERATIVE	$0.00
	BADGER CROPS CLUB (UW)	$290.00
	BEHAVIORAL SCIENCE LAW ASSOCIATION	$250.00
	BLACK GRADUATE AND PROFESSIONAL STUDENT ORGANIZATIO	$400.00
	BRAZILIAN ASSOCIATION	$470.00
	CAMPUS COALITION FOR ISRAEL	$130.00

	CHINESE INDEPENDENT UNION	$863.00
	COMMUNITY ACTION ON LATIN AMERICA	$450.00
	COUNCIL OF AMERICAN INDIAN GRAD & PROF STUDENTS	$400.00
	DELTA SIGMA THETA SORORITY, INC.	$200.00
	ENTOMOLOGY GRADUATE STUDENT ASSOCIATION (THE)	$250.00
	ENVIRONMENTAL LAW SOCIETY (UW)	$400.00
	FOOD SCIENCE CLUB	$130.00
	FOOD SCIENCE CLUB TRAVEL REQUEST	$550.00
	HELLENIC STUDENT ASSOCIATION OF UW MADISON	$550.00
	HISTORY ORGANIZATION/PHI ALPHA THETA (THE)	$160.00
	INDEPENDENT FILM AND VIDEO COLLABORATIVE	$440.00
	INDIGENOUS LAW STUDENTS ASSOCIATION	$500.00

	INDONESIAN STUDENT ASSOCIATION (PERMIAS)	$715.00
	THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENG	$400.00
	INTERNATIONAL HEALTH EXCHANGE (TRAVEL GRANT)	$0.00
	INTERNATIONAL HEALTH EXCHANGE	$345.00
	INTERNATIONAL LAW SOCIETY	$0.00
	INTERNATIONAL RELATIONS CLUB (THE)	$690.00
	INTERNATIONAL SOCIALIST ORGANIZATION	$350.00
	INTERNATIONAL STUDENT COUNCIL	$348.00
	JEWISH COALITION	$160.00
	JEWISH OUTREACH GROUP IN THE DORMS	$150.00
	JEWISH OUTREACH IN THE DORMS (TRAVEL GRANT)	$0.00
	KHMER STUDENTS ASSOCIATION	$300.00
	LA COLECTIVA CULTURAL DE AZTLAN	$665.00

	LA COLECTIVA CULTURAL DE AZTLAN (TRAVEL GRANT)	$250.00
	LINGUISTIC STUDENT ORGANIZATION (THE)	$220.00
	MADISON FILM FORUM	$400.00
	MADISON HUNGER TASK FORCE	$319.00
	MADISON TREATY RIGHTS SUPPORT GROUP	$435.00
	MADISON TURKISH STUDENT ASSOCIATION	$400.00
	MADPAC	$100.00
	MALAYSIAN STUDENT ASSOCIATION	$270.00
	MEXICAN STUDENT ASSOCIATION	$383.00
	MILITANT STUDENT UNION OF WISCONSIN (THE)	$375.00
	MINORITY GRADUATE STUDENTS IN BUSINESS	$290.00
	MINORITY GRADUATE STUDENTS IN BUSINESS-Travel	$800.00
	MULTIRACIAL STUDENT ASSOCIATION	$200.00

	MYRIAD	$185.00
	PAKISTAN STUDENTS ASSOCIATION	$300.00
	PI SIGMA ALPHA	$200.00
	PRE-VETERINARY ASSOCIATION	$255.00
	PRE-VETERINARY ASSOCIATION Travel	$200.00
	PROGRESSIVE STUDENT NETWORK	$590.00
	OI GONG ASSOCIATION AT UW MADISON	$210.00
	RECREATION EDUCATION CLUB (UW)	$180.00
	SIMBIOTA	$400.00
	SINGAPORE STUDENTS' ASSOCIATION	$780.00
	SONOO	$275.00
	STUDENT ASSOCIATION OF THE REPUBLIC OF CHINA	$800.00
	STUDENT LABOR ACTION COALITION	$265.00
	STUDENT SOLIDARITY	$210.00
	STUDENT WISCONSIN EDUCATION ASSOCIATION	$470.00

	STUDENTS FOR A FREE TIBET	$325.00
	STUDENTS FOR CHOICE	$0.00
	STUDENTS HELPING OTHERS	$350.00
	STUDENTS OF EDUCATION	$450.00
	STUDENTS OF OBJECTIVISM	$310.00
	STUDENTS OF THE NATIONAL ORGANIZATION FOR WOMEN	$300.00
	TEN PERCENT SOCIETY (THE)	$550.00
	UNION PUERTORRIQUENA (TRAVEL GRANT)	$260.00
	UNION PUERTORRIQUENA	$800.00
	WILDLIFE ECOLOGY CLUB	$295.00
	WISCONSIN BLACK STUDENT UNION	$365.00
	WISCONSIN FUTURE ALUMNI ASSOCIATION	$350.00
	WISCONSIN PUBLIC INTEREST LAW FOUNDATION	$650.00

	WISCONSIN STUDENT BLACK LIBERATION FRONT	$225.00
	WUNK SHEEK	$384.00
	Total	**$30,902.00**
Last Minute Operations Grants		**Approved Amount**
	AHANA	$125.00
	Alpha Kappa Alpha	$90.00
	Alternative Medicine Club	$40.00
	American Society of Quality Control	$100.00
	Asian Christian Fellowship	$105.00
	Best Buddies	$110.00
	Bi-Partisan Advisory Board for Better Leadership	$70.00
	Bolivian Student Association	$105.00
	The Buberians	$60.00
	Business and Tax Law Association	$100.00
	Cam. Carribean Association of Madison	$125.00
	Chi Alpha-Christians in Action	$75.00

	UW-Madison Council on Family Relations	$100.00
	Cultural Organization of Iranian Students	$95.00
	Debate Team	$100.00
	Discourse	$175.00
	Filipino-American Student Organization	$85.00
	Hong Kong MUG Publisher	$115.00
	India Students Association	$90.00
	Korean American Student Association	$100.00
	Korean Undergraduate	$100.00
	LaFollette Institute Student Association	$95.00
	National Agri-Marketing Association	$100.00
	Nigerian Student Union	$95.00
	The Open Face Theatre Collective	$90.00
	Pacific Center for International Studies	$75.00
	Pre-School of Pharmacy Club	$100.00
	UW Scandinavian American Student Association	$100.00

	Sigma Alpha Iota-Rho Chapter	$80.00
	Sigma Gamma Rho Sorority INC.	$90.00
	Society of Hispanic Professional Engineers	$100.00
	Society of Manufacturing Engineers	$0.00
	Students of Occupational Therapy Association	$100.00
	UW Student Pugwash	$110.00
	UW Student Quality Initiative	$60.00
	SIMPLE	$120.00
	Thai Students Association	$110.00
	University Physical Society	$99.00
	Vietnamese Student Organization	$120.00
	Women's History Community	$115.00
	Total	**$3,954.00**
	Total of Grant Allocations	**$109,277.00**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR; JONATHAN B. BARRY; JOHN T. BENSON; BRIGIT E. BROWN; JOHN BUDZINSKI; ALFRED S. DE SIMONE; LEE S. DREYFUS; DANIEL C. GELATT; KATHLEEN J. HEMPEL; RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH; VIRGINIA R. MACNEIL; SAN W. ORR, JR.; GERARD A. RANDALL, JR.; JAY L. SMITH and GEORGE K. STEIL, SR., all in their official capacities as members of the Board of Regents of the University of Wisconsin System,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' INTERROGATORIES

Plaintiffs' Interrogatory No. 1:

Why has the Board required plaintiffs and other students to pay the segregated fee in order to attend UW-Madison?

Defendants' Response to Interrogatory No. 1:

The primary justification for the segregated fee arrangement at the UW Madison is found in sec. 36.09(5), Wis. Stats. The University of Wisconsin has a long tradition of charging fees to students to cover expenses of university life and services that are not funded through tuition. As far back as 1848 there is evidence that the Regents of the University of Wisconsin charged student fees separate from tuition. In 1875 the fees covered such expenses as "heating and lighting the university hall and public rooms, music, each diploma, and a matriculation fee in the law department." *The State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159, 163-64 (1882). In 1949 the fees covered "admission to athletic contests, concerts, class dues, cap and gown fees, science laboratory fees, music fees, etc." 38 OAG 516 (1949). Pursuant to Rule 33(d) of the Federal Rules of Civil Procedure, defendants are also producing documents (Bates stamped 1731 - 1753) in response to Interrogatory No. 1.

Plaintiffs' Interrogatory No. 2:

Please state which (if any) of the following reasons the defendants use to justify their arrangement at the UW-Madison of requiring students to pay the segregated fee and then funding various groups with those fees:

a) to enhance the educational experience at UW-Madison by stimulating advocacy and debate on diverse points of view.

b) to educate students by allowing them to participate in political activity.

c) to promote student participation in campus administrative activity.

d) to promote extracurricular activities for students.

e) to give students opportunities to develop social skills.

Defendants' Response to Interrogatory No. 2:

All of the reasons listed in Interrogatory No. 2 support the segregated fee and the fee allocation process, but the basic reason for the requirement of fees, is that fees enable the university to provide services that are essential to, and which enrich, campus and student life, that are distinguishable from instruction supported by tuition. The Wisconsin statutes place primary responsibility for decision-making about the fees in the hands of the students. The decision-making process established by the Board of Regents and by the UW Madison on allocable segregated fees reflects the statutory responsibility assigned to students in this area. See also Defendants' Response to Interrogatory No. 1.

Plaintiffs' Interrogatory No. 3:

Please state any other reasons the defendants use to justify the arrangement at the UW-Madison of requiring students to pay the segregated fee and then funding various groups with those fees.

Defendants' Response to Interrogatory No. 3:

See Defendants' Response to Interrogatories Nos. 1 and 2.

Plaintiffs' Interrogatory No. 4:

How do the Board or the Chancellor determine whether groups receiving funding from the segregated fee are spending the funds in compliance with University policy, particularly the guidelines found in Financial Policy and Procedure Paper 20 (June 8, 1987)?

Defendants' Response to Interrogatory No. 4:

Staff from the Office of the Dean of Students meet with student government allocation committees to help inform them of policies of the Board of Regents. University staff serving as advisors to allocation committees review applications and advise the committees about any potential problems in meeting University guidelines. Staff from the Office of the Dean of Students process all student organization requests for payment of allocated segregated fee funds. These requisitions are subject to the same Business Services pre-audit scrutiny as all other expenditures of University funds. Finally, Dean of Students staff investigate and resolve any allegations of violations of policies of the Board of Regents.

Plaintiffs' Interrogatory No. 5:

Please describe any occurrences in the last five years in which the Board of Regents refused to confirm the UW-Madison student government's disposition of the segregated fees, as the Board has authority to do under Wisconsin Statute §36.09(5).

Defendants' Response to Interrogatory No. 5:

In 1991, UW Madison Chancellor Donna Shalala denied a student government decision to renew the allocation of segregated fees to the Women's Transit Authority ("WTA") because she believed the WTA's employment and service practices violated federal and state statutes and University policy by discriminating on the basis of gender. The student government appealed the decision to the Board of Regents. A Board committee heard the case and upheld the Chancellor's decision.

Plaintiffs' Interrogatory No.6:

If there were any occurrences you listed in response to Interrogatory #5, please list the group denied funding and the date and the reason why they were denied funding.

Defendants' Response to Interrogatory No. 6:

See Defendants' Response to Interrogatory No. 5.

Plaintiffs' Interrogatory No. 7:

Please describe any occurrences in the last five years when the Board of Regents or the Chancellor took some action against a campus group because it spent money from the segregated fee in a way that violated University policy.

Defendants' Response to Interrogatory No. 7:

In 1991, the Office of the Dean of Students investigated an allegation of false time sheet reporting by a student employee in the Women's Center. After investigation, the student in question reimbursed the Women's Center segregated fee account to cover the salary overpayment.

Plaintiffs' Interrogatory No. 8:

If there were any occurrences in response to Interrogatory #7, please identify each group, the date the Board or the Chancellor took action and what action they took.

Defendants' Response to Interrogatory No. 8:

See Defendants' Response to Interrogatory No. 7.

Plaintiffs' Interrogatory No. 9:

Please describe how the Chancellor consults with the student government to determine how the segregated fee is to be spent, as outlined in Wisconsin Statute §36.09(5).

Defendants' Response to Interrogatory No. 9:

After the student government (Associated Students of Madison and the Student Services Finance Committee ("SSFC")) goes through its budget process, the chair of the SSFC meets with the Chancellor and presents SSFC's recommendations on all SSFC fees, including allocable and non-allocable fees. This meeting takes place each year in early March.

Plaintiffs' Interrogatory No. 10:

Please describe what authority, if any, the student government at UW-Madison has to make decisions involving academic or curricular matters there.

Defendants' Response to Interrogatory No. 10:

The UW Madison student government does not have any authority to make decisions involving academic or curricular matters. Students do participate in discussions about these issues with the faculty and the Chancellor.

Plaintiffs' Interrogatory No. 11:

Please read the following two policy statements and state whether the defendants think they are consistent or in conflict.

University of Wisconsin Financial Policy and Procedure Paper No. 20 (June 8, 1987) lists guidelines on what things student groups may spend segregated fee funds on. On page 6, this paper states: "B. INAPPROPRIATE EXPENDITURES" . . .

"6. Activities which are politically partisan or religious in nature."

The Student Services Finance Committee distributes a "1996-97 GSSF Application and Instructions." The section

entitled, "GSSF Policy Statements" states the criteria for student groups to be eligible to apply for funding. The "GSSF Policy Statements" say in part:

7. The organization does not have a primarily political orientation (i.e. is not a registered political group) and shall not use SUFAC funds for any lobbying purposes." (Emphasis in original)

"8. The organization does not have a primarily religious orientation." (Emphasis in original.)

Defendants' Response to Interrogatory No. 11:

See Defendants' Response to Interrogatory No. 12.

Plaintiffs' Interrogatory No. 12:

Please explain the answer you gave in answer to Interrogatory #11 as to why the defendants find these two policies consistent or inconsistent.

Defendants' Response to Interrogatory No. 12:

The two policy statements do not appear inconsistent. University of Wisconsin Financial Policy and Procedure Paper No. 20 (June 8, 1987) ("FPPP 20") is a University of Wisconsin System policy listing "activities" that are not appropriate for expenditure of segregated fees. The "1996-97 GSSF Application and Instructions" states the criteria an organization must meet to be considered for GSSF funding, used to fund student services, by the UW Madison student government. FPPP 20 applies to all expenditures of segregated fees without regard to the nature of the organization making the expenditure. Under UW System policies, a "primarily political" student group could receive and spend segregated fees for an activity that was not "politically partisan." UW Madison student government adds

a criterion that is more restrictive than the UW System policy, which is limited to student service funding.

Plaintiffs' Interrogatory No. 13:

If the answer to No. 11 is that they are inconsistent, please state which one is the policy that student groups receiving funding must comply with.

Defendants' Response to Interrogatory No. 13:

See Defendants' Response to Interrogatory No. 12.

Plaintiffs' Interrogatory No. 14:

Please explain the reason(s) why the policies quoted in Interrogatory #11 prohibit what they do.

Defendants' Response to Interrogatory No. 14:

The policies are meant as guidelines to be used by administrators. They paraphrase or summarize legal requirements that are codified elsewhere. They are not administrative rules. FPPP 20 attempts to apply the general guidelines for appropriate uses of State funds and resources to the area of segregated fee decision-making. As provided in sec. 36.09(5), Wis. Stats., students at UW Madison have established their own criteria for making allocation decisions.

Plaintiffs' Interrogatory No. 15:

In the last five years, have there been any situations in which a group was denied funding or lost funding from the segregated fee fund because it had violated or would violate the policies quoted in Interrogatory #11?

Defendants' Response to Interrogatory No. 15:

Neither the Board of Regents nor the Chancellor has withdrawn or denied UW Madison segregated fee funding to

a group on the grounds set forth in Interrogatory No. 11. In the last five years no application to the General Student Services Fund has been rejected on the grounds set forth in Interrogatory No. 11. Some applications to the Associated Students of Madison for operations grants have been rejected for violating the policies quoted in Interrogatory No. 11.

Plaintiffs' Interrogatory No. 16:

If you list any occurrences in answer to Interrogatory #15, please list the group, the date of the occurrence and the reason why they were denied funding or lost their funding.

Defendants' Response to Interrogatory No. 16:

Attached are copies (Bates stamped 1754-1807) of applications to the Associated Students of Madison (and its predecessor) that were denied funding; it is believed that these denials may have been based on the policies set forth in Interrogatory No. 11. Records do not exist to establish whether in fact the quoted policies were the basis of the denial. Records do not exist for decisions made before the 1992-93 year.

Dated this 30th day of September, 1996.

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN
Assistant Attorney General
State Bar #1022052

PETER C. ANDERSON
Assistant Attorney General
State Bar #1017321

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR;
JONATHAN B. BARRY; JOHN T. BENSON;
BRIGIT E. BROWN; JOHN BUDZINSKI;
ALFRED S. DE SIMONE; LEE S. DREYFUS;
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RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH;
VIRGINIA R. MACNEIL; SAN W. ORR, JR.;
GERARD A. RANDALL, JR.; JAY L. SMITH and
GEORGE K. STEIL, SR., all in their official
capacities as members of the Board of Regents
of the University of Wisconsin System,

Defendants.

AFFIDAVIT OF JESSICA BRUSKY

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, JESSICA BRUSKY, being duly sworn on oath, state that I am a full-time student at the UW-Madison. I make this affidavit based on my personal knowledge.

1. I am the Coordinator of the UW Project for the Madison AIDS Support Network (MASN).

2. MASN is a community-based organization. The UW Project is a part of that organization.

3. All funding received from the student segregated fees went to the UW Project. The UW Project keeps separate accounts from the rest of MASN.

4. Approximately $19,000 of the $26,000 from GSSF funds salaries of the three employees of the UW Project, myself and two student health educators.

5. The condom wrapper plaintiffs included in the record at MASN Tab, Document #3, was not funded by the UW Project.

6. All funds from GSSF go to education and outreach on the UW-Madison campus.

7. The UW Project's main focus is presentations. The purpose of the presentations is to promote safer sex, awareness of HIV, and awareness of MASN (MASN, not the UW Project, provides direct care services to students). Presentations are made in residence halls, sororities, classrooms, etc.

8. All of MASN's services are free to students.

9. MASN serves the entire Madison community regardless of sexual orientation. HIV is an equal opportunity disease.

/s/ Jessica Brusky
JESSICA BRUSKY

Subscribed and sworn to before me this 6 day of November 1996.

/s/ Connie Anderson
Notary Public, State of Wisconsin
My Commission: 3/7/99

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE and KEITH BANNACH,
Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR;
JONATHAN B. BARRY; JOHN T. BENSON;
BRIGIT E. BROWN; JOHN BUDZINSKI;
ALFRED S. DE SIMONE; LEE S. DREYFUS;
DANIEL C. GELATT; KATHLEEN J. HEMPEL;
RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH;
VIRGINIA R. MACNEIL; SAN W. ORR, JR.;
GERARD A. RANDALL, JR.; JAY L. SMITH and
GEORGE K. STEIL, SR., all in their official
capacities as members of the Board of Regents
of the University of Wisconsin System,
Defendants.

AFFIDAVIT OF JOHN PECK

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

JOHN PECK, being duly sworn on oath, states that:

1. I am a student at the UW-Madison.

2. I am a part-time staff person of the UW Greens.

3. During the 1995-96 academic year, I was a member of the Progressive Student Network.

4. The UW Greens and the Progressive Student Network co-sponsored, along with many other organizations and individuals, 1995 Assembly Bill 336, 1995 Assembly Bill 338 and 1995 Assembly Bill 339.

5. The three assembly bills were not written on behalf of the UW Greens and the Progressive Student Network. Representative Spencer Black contacted the groups and asked them if they wanted to join in sponsoring the bills.

6. The UW Greens is a nonpartisan organization.

7. The UW Greens does not prepare or distribute the literature plaintiffs have provided of the Greens party. The UW Greens does have these documents in its files. If a person wants to review UW Greens' files or any political party or other coalition they are welcome and can make copies at their own expense.

8. The UW Greens educates people on issues and urges people to take a stand.

9. No monies from the UW Madison student activity fee funded the co-sponsoring by UW Greens and Progressive Student Network of 1995 Assembly Bill 336, 1995 Assembly Bill 338 and 1995 Assembly Bill 339.

10. Most of the monies from the student activity fees provided to the UW Greens is spent on educational materials, namely fact sheets.

/s/ John Peck
JOHN PECK

Subscribed and sworn to before me this 26 day of October, 1996.

/s/ Alan Lee
Notary Public, State of Wisconsin
My Commission: is permanent.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR; JONATHAN B. BARRY; JOHN T. BENSON; BRIGIT E. BROWN; JOHN BUDZINSKI; ALFRED S. DE SIMONE; LEE S. DREYFUS; DANIEL C. GELATT; KATHLEEN J. HEMPEL; RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH; VIRGINIA R. MACNEIL; SAN W. ORR, JR.; GERARD A. RANDALL, JR.; JAY L. SMITH and GEORGE K. STEIL, SR., all in their official capacities as members of the Board of Regents of the University of Wisconsin System,

Defendants.

AFFIDAVIT OF KERRY SCHUMANN

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, KERRY SCHUMANN, being duly sworn on oath, state that:

1. My name is Kerry Schumann. I reside at 2705 University Ave., #13, Madison, Wisconsin 53705. I make this affidavit based on my personal knowledge.

2. I am currently employed by the Wisconsin Student Public Interest Research Group (Wisconsin Student PIRG) as the Organizing Director. As Organizing Director, I am responsible for working with the student directors of Wisconsin Student PIRG to develop the organization's budget and programs. I am responsible for implementing the decisions of the student Board of Directors as they relate to the programs and policy positions of the organization, as well as overseeing the day-to-day activities of the organization and its campus chapters.

3. Wisconsin Student PIRG is formed as a Wisconsin non-profit corporation and is exempt from federal income taxation under Section 501(c)(4) of the Internal Revenue Code.

4. In general, the activities of Wisconsin Student PIRG may be described as research, education and advocacy involving students on University campuses in Wisconsin on issues of consumer and environmental protection, human services, and good government. Wisconsin Student PIRG provides training and co-curricular educational opportunities for students to become involved in issues of importance to them, through which they can gain valuable real world experience. Students may also participate in course credit internships through Wisconsin Student PIRG, under the guidelines established by the University of Wisconsin. Wisconsin Student PIRG's programs and activities are determined by the Board of Directors, composed of University of Wisconsin students elected by students who participate in Wisconsin Student PIRG at the campus level.

5. Examples of Wisconsin Student PIRG's programs and activities over the past two years include:

a. student voter registration;

b. environmental education on campus and in elementary and middle schools;

c. Hunger and homelessness awareness and education;

d. campus book swap;

e. environmental defense, educating students about attempts to roll back environmental, health and safety protections.

6. Wisconsin student PIRG's current programs and activities for the Fall 1996 semester are:

a. campus book swap;

b. environmental education on campus and in elementary and middle schools;

c. hunger and homelessness awareness and education;

d. voter registration and voter education ("Youth Vote");

e. good government ("Americans Against Political Corruption").

7. Since its incorporation Wisconsin Student PIRG has existed as a separate, independent non-profit corporation. Wisconsin Student PIRG is separate from and independent of the Wisconsin State Public Interest Research Group, although both organizations do at times employ a common acronym--"WISPIRG." Wisconsin Student PIRG and Wisconsin State Public Interest Research Group do not share any common officers or directors. The revenues and expenditures of each corporation are kept separate and distinct.

8. The Wisconsin State Public Interest Research Group receives no student fees from the University of Wisconsin System.

9. The Wisconsin State Public Interest Research Group engages in public education and advocacy throughout the State of Wisconsin, directing its citizen outreach efforts toward members of the Wisconsin community at large, rather than the campuses of the University of Wisconsin.

10. Wisconsin Student PIRG does not sponsor legislation in the Wisconsin State Legislature, nor does it hire or retain lobbyists or legislative agents to engage in lobbying before the Wisconsin State Legislature or other branches of Wisconsin government.

11. Wisconsin Student PIRG does not conduct door-to-door citizens outreach canvass. Wisconsin Student PIRG does not endorse or oppose candidates for public office and does not publish or distribute materials relating to the legislative records or elected public officials.

12. Wisconsin Student PIRG and Wisconsin State Public Interest Research Group may work on similar issues, including issues of consumer and environmental protection. However, as stated above, Wisconsin Student PIRG's activities are undertaken by students and are oriented to provide training and educational experiences to those students who participate and to all students at the University of Wisconsin.

13. Wisconsin Student PIRG's budget is supported by student fees provided by the General Student Services Fund ("GSSF"). Funds allocated to Wisconsin Student PIRG by the student government are used solely to support the programs of Wisconsin Student PIRG, including personnel costs for paid staff, publications and materials, and miscellaneous

operating and overhead costs associated with the organization. Wisconsin Student PIRG also receives incidental income from interest on its bank accounts and may receive income in the form of grants from other public interest organizations.

/s/ Kerry Schumann
KERRY SCHUMANN

Subscribed and sworn to before me this 28 day of October, 1996.

/s/ Steven Morris
Notary Public, State of California
My Commission: Oct. 13, 1998

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR;
JONATHAN B. BARRY; JOHN T. BENSON;
BRIGIT E. BROWN; JOHN BUDZINSKI;
ALFRED S. DE SIMONE; LEE S. DREYFUS;
DANIEL C. GELATT; KATHLEEN J. HEMPEL;
RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH;
VIRGINIA R. MACNEIL; SAN W. ORR, JR.;
GERARD A. RANDALL, JR.; JAY L. SMITH and
GEORGE K. STEIL, SR., all in their official
capacities as members of the Board of Regents
of the University of Wisconsin System,

Defendants.

AFFIDAVIT OF LAUREN ONKELES

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, LAUREN ONKELES, being duly sworn on oath state that:

1. I am a full time student at the University of Wisconsin at Madison.

2. I am the Outreach and Volunteer Coordinator at the Campus Women's Center. I make this affidavit based on my personal knowledge.

3. The Campus Women's Center offers both educational and informational material and services for all students on campus. We provide free child care for student parents by matching volunteers with prospective mothers and fathers and are actively involved in the Child Care Tuition Assistance Program. We also have one night a month where parents can drop their children off at the Eagle Heights Community Center in order to study or go out without worrying about the cost or hassle of a baby-sitter. We have student facilitated support groups for students and members of the community on issues including depression, eating disorders and surviving sexual assault. We train volunteers to be a part of our Speaker's Bureau which presents programs on sexism, body image, disordered eating, and the many issues faced by diverse women. We have a full library open to students. We also act as a referral agency for students on campus to other agencies providing services they require.

4. The Campus Women's Center is a student service organization composed of seven paid coordinators and many unpaid volunteers. The coordinators are: Staff/Finance, Programming, Publicity, Child Care, Support Services, Resource/Referral/Advocacy, Outreach/Volunteer. The entire budget of the Campus Women's Center comes from the segregated fees, and without that money, the Center would be forced to close. Out of the $34,300 budget for the Women's Center for the 1995-96 year, $23,500 went to salaries for the coordinators. The remaining $10,800 was used for programming, office supplies, printing and advertising.

5. The Campus Women's Center publishes a newsletter every two months. In our newsletter, we publish well written

essays that are submitted to us on time and which concern women's issues or issues of interest to women. We encourage the submission of conflicting articles and are currently working on gathering articles on the W2 welfare reform debate. We view our newsletter as a forum for the expression of ideas important to women, regardless of which side of an issue is being supported.

6. In our newsletter we did publish an article taking a position against the "Informed Consent" abortion bill, but that article expressed the views of the author, not the Campus Women's Center.

7. The Women's Center has never taken a stand on the issue of abortion. We have actively decided not to take a stand in order to avoid alienating women from the Center.

8. We also published in our newsletter an article submitted by State Representative Tammy Baldwin opposing an anti-same sex marriage bill. This article expressed the views of the author, not the Campus Women's Center.

9. The fact sheet "Introduction to Lesbian Motherhood" that plaintiffs put in their Record is not funded by the Campus Women's Center. That pamphlet, along with over 70 others, can be found in a bureau in the hallway of the Campus Women's Center, as a part of the Center's information resources.

10. Denying General Student Services Fund (GSSF) funding to the Campus Women's Center will deny the student

body of much needed services and access to information, because the funding is vital to the Campus Women's Center's existence.

/s/ Lauren Onkeles
LAUREN ONKELES

Subscribed and sworn to before me this 28 day of October, 1999.

/s/ Connie Anderson
Notary Public, State of Wisconsin
My Commission: 3/7/99

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR;
JONATHAN B. BARRY; JOHN T. BENSON;
BRIGIT E. BROWN; JOHN BUDZINSKI;
ALFRED S. DE SIMONE; LEE S. DREYFUS;
DANIEL C. GELATT; KATHLEEN J. HEMPEL;
RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH;
VIRGINIA R. MACNEIL; SAN W. ORR, JR.;
GERARD A. RANDALL, JR.; JAY L. SMITH and
GEORGE K. STEIL, SR., all in their official
capacities as members of the Board of Regents
of the University of Wisconsin System,

Defendants.

AFFIDAVIT OF ROGER HOWARD

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, ROGER HOWARD, being duly sworn on oath, state that:

1. I am the Associate Dean of Students at the UW-Madison. I make this affidavit based on my personal knowledge.

2. Student organizations at the UW-Madison contribute significantly to the diversity and richness of the university community. Student groups provide opportunities for students to learn about specific topics and to develop teamwork and leadership skills. The more than 500 student organizations registered with the University each year also develop and present most of the many out-of-class programs available to students, faculty and staff, ranging from lectures, musical events, films, debates, dance groups, and a large array of discussion groups covering special interest or skill-building topics. Funds are required to present these programs. For example, to attract a speaker of national renown, the organization often has to cover at least the travel expenses of the speaker, if not an honorarium.

3. During the past ten years, a number of student organizations have been formed to deliver particular services to students. Several of these service groups have applied for and received segregated fee allocations through the General Student Services Fund ("GSSF") to cover costs for staff, office rental, office supplies, etc. Legal assistance, tutoring, tenant information, and support for veterans are a few examples of these student-initiated, student-run service programs. This group of services also includes the Lesbian, Gay, Bisexual Center and the Campus Women's Center which provide information and support for LGB students and women at the University, groups that have been and may yet be targets of discrimination, attack or ignorance. For many students, these centers with their staff, small libraries, and various programs are important sources of support and serve as evidence that they are welcomed to the University community. The

Madison AIDS Support Network ("MASN") is a larger community information and support organization receiving financial support from several different sources in Dane County. UW-Madison students provide segregated fee funding for additional staff to enable MASN with its county-wide responsibilities to target the University community for special efforts to provide information about AIDS to students. UW Greens and Wisconsin Student PIRG both assist students who wish to investigate environmental issues that affect the local, state, national, and international community and to consider how they might wish to become involved in seeking the resolution of the problem. WISPIRG especially has been effective in helping students identify projects that fit with their academic work in the classroom so that students can experience both service and learning around the same topic.

4. The students of the UW-Madison voted in a referendum on October 15th-17th not to fund the United States Student Association for 1997-98.

5. The Militant Student Union of the University of Wisconsin ceased to exist on February 27, 1996.

/s/ Roger Howard
ROGER HOWARD

Subscribed and sworn to before me this 25 day of October, 1999.

/s/ Marlene M. Nlarbess
Notary Public, State of Wisconsin
My Commission: 10/27/96

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 96-C-0292-S

SCOTT HAROLD SOUTHWORTH,
AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs,

v.

MICHAEL W. GREBE; SHELDON B. LUBAR; JONATHAN B. BARRY; JOHN T. BENSON; BRIGIT E. BROWN; JOHN BUDZINSKI; ALFRED S. DE SIMONE; LEE S. DREYFUS; DANIEL C. GELATT; KATHLEEN J. HEMPEL; RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH; VIRGINIA R. MACNEIL; SAN W. ORR, JR.; GERARD A RANDALL, JR.; JAY L. SMITH and GEORGE K. STEIL, SR., all in their official capacities as members of the Board of Regents of the University of Wisconsin System,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs did not file proposed findings of fact and conclusions of law, but did present a lengthy discussion of the facts and law in Plaintiffs' Brief In Support of Motion for Summary Judgment. Defendants treated that discussion of facts and law as proposed findings of fact and conclusions of law, and submit the following responses. Defendants have

included in their responses to plaintiffs' proposed findings of fact additional relevant facts. Defendants have also set forth a few separate additional proposed findings of fact.

Plaintiffs' Proposed FOF ¶ 1:
Beliefs of the Three Students

The three plaintiffs are all law students enrolled at the University of Wisconsin-Madison's law school. (Answer, ¶ 1). Scott Harold Southworth and Keith Bannach are third year students, and expect to graduate in May 1997. Amy Schoepke is a second year student, who expects to graduate from law school in May 1998. (The facts listed here are based on the affidavits of the three plaintiff law students and their depositions, which are all included in the plaintiffs' exhibits).

All three of the law students describe their political philosophy as conservative and all three consider themselves Republicans. All three are Christians and believe that the Bible is the Word of God and they are to live their lives according to its teachings.

Because of their political, ideological and religious views, the three plaintiffs believe and hold to the following beliefs:

They oppose legalized abortion. They believe that the Bible teaches that abortion is the taking of an innocent life. They believe that God created sex to be engaged in only within the institution of marriage, and define marriage to be one man and one woman. Therefore, they oppose sex outside of marriage and homosexual conduct. They oppose efforts to promote abortion, and statements that homosexuality is normal and should be protected under law.

The three plaintiffs support the American free enterprise system and oppose socialism and expansive governmental regulation of involvement in the economy. They oppose

unnecessary governmental protection of the environment that costs jobs and denies people of their property rights.

The three plaintiffs consider themselves Republicans, and generally support the views of the Republican Party. They support the Contract with America. They also generally support the policies of Governor Tommy Thompson and his budget priorities.

The plaintiffs also support Governor Tommy Thompson's efforts to expand U.S. Highway 12 from two lanes to four lanes. One of the plaintiffs, Scott Harold Southworth, drives frequently on U.S. Highway 12. He thinks that the current two lane road is unsafe, and needs to be widened to four lanes. (Affidavit of Scott Harold Southworth, ¶10).

Response: For purposes of this motion, NOT DISPUTED.

Plaintiffs' Proposed FOF ¶ 2:

The three plaintiffs believe that all students have the right to express their opinion at the University by distributing literature on campus, renting rooms at the University for speakers advocating their viewpoints, lobbying the Wisconsin Legislature and the Congress, supporting and opposing political candidates, conducting protest marches, etc. However, the plaintiffs also believe that no one should be forced to pay for education at the University of Wisconsin and also pay additional funds to subsidize the political and ideological advocacy of others, including student groups. Even though the plaintiffs might agree with or not oppose certain points of view expressed by some of the groups receiving funds from the segregated fee, they believe they should not be forced to pay to subsidize the political or ideological expression of student groups as the price to pay in order to receive their grades or to graduate. They believe that no student should be compelled by the University to fund the

private advocacy of student groups as a requirement in order to attend the University and to graduate from there.

Also, the plaintiffs object to the views of many of the student groups receiving funding from the segregated fee. They believe that they should be able to attend the University without the Board of Regents imposing a requirement that they fund student groups who express views with which they disagree.

Response: Defendants DO NOT DISPUTE that Plaintiffs' FOF ¶ 2 set forth plaintiffs' views and objections, however there is no legal basis for plaintiffs' statement that they should be able to attend the UW-Madison without funding advocacy, whether or not they agree with it and whether or not it is germane.

Defendants DO NOT DISPUTE that the University should provide fora for all opinions, including advocacy, as plaintiffs have described, however defendants view the challenged funding process as an integral part of those fora.

Plaintiffs' statements ignore the *services* provided by the challenged organizations to the campus community. The challenged organizations funded by the General Student Services Fund (GSSF) (Campus Women's Center, Lesbian, Gay Bisexual Campus Center, Madison AIDS Support Network, WISPIRG, United States Student Association and UW Greens) according to the parties' stipulation, "provide direct, ongoing services to significant numbers of UW-Madison students" and "contribute significantly to student health, safety or academic success" (Stip. ¶ 13).

Plaintiffs' Proposed FOF ¶ 3:
Political and Ideological Advocacy by Student Groups Receiving Funding

Here are examples of the private student groups at the University of Wisconsin-Madison that receive funding from the segregated fee and also engage in political or ideological advocacy. Although the plaintiffs do not necessarily oppose every specific political or ideological position taken by every group subsidized by the segregated fee, they do oppose students being compelled by the University to support any student group in order to attend and graduate from the University.

Response: DISPUTED. First of all, as will be demonstrated in defendants' responses to subsequent proposed findings of fact, plaintiffs have failed to show the connection that monies from the segregated fee went to support the cited political or ideological advocacy. Second, defendants DISPUTE that all of the referenced speech in the subsequent proposed findings of fact is "political or ideological advocacy."

Plaintiffs cite "examples", however they are not representative examples.

The organizations listed are not "private student groups"; the majority are Registered Student Organizations whose meetings, events and services are open/available to all students. Some are student organization adjuncts to community organizations.

Plaintiffs' Proposed FOF ¶ 4:
WISPIRG

The Wisconsin Public Interest Research Group (WISPIRG) received $49,500.00 from the segregated fee during the 1995-96 school year (Record, WISPIRG tab, Set

of Documents #1). WISPIRG describes itself as "one of the state's leading consumer and environmental watchdog groups." (Record, WISPIRG tab, Set of Documents #4 - newsletter, p. 5). WISPIRG writes that since 1987:

> we [WISPIRG] have helped win new clean air and water laws, exposed corporate greed and government boondoggles, uncovered numerous examples of political hypocrisy, and stood up for Wisconsin citizens and the environment.

Record at *Id.* WISPIRG fulfills its mission by extensive political and ideological activism.

Response: DISPUTED. The Wisconsin *Student* Public Interest Research Group (Wisconsin Student PIRG) did get the funding indicated. However, the newsletters upon which the remaining statements are based are not publications of Wisconsin Student PIRG and were not funded by segregated fees (Schumann aff., ¶s 7-12). The Wisconsin State Public Interest Research Group is a separately funded and run organization. *Id.*

Plaintiffs' Proposed FOF ¶ 5:
Lobbying at the Wisconsin Legislature

During the 1995-96 Session of the Wisconsin Assembly, WISPIRG asked legislators to introduce legislation to restrict mining in Wisconsin (Record, WISPIRG tab, Set of Documents #2). During the 1995-96 Session of the Wisconsin Assembly, legislators introduced Assembly Bill 336 (eliminating the exemption for mining activities from the Department of Natural Resource's duty to set standards for harmful substances in groundwater), Assembly Bill 338 (relating to exemptions from rules regulating mining and regulating the storage and disposal of mining waste) and Assembly Bill 339 (concerning mining on state-owned land).

All three of these bills say that they were introduced "by request of ... Wisconsin Public Interest Research Group (WISPIRG)." (The bills also say they were introduced "by request of ... UW Greens .... the Progressive Student Network." These two groups also receiving funding through the segregated fee).

Response: DISPUTED IN PART. Defendants admit that plaintiffs represented the bills correctly. However, Wisconsin Student PIRG did not co-sponsor the bills indicated (Schumann aff., ¶ 10). The Wisconsin State Public Interest Research Group did so. Wisconsin Student PIRG is a separate, independent non-profit corporation from Wisconsin State Public Interest Research Group although they both do at times employ the same acronym, "WISPIRG" (Schumann aff., ¶s 7-10).

Plaintiffs' Proposed FOF ¶ 6:
Supporting and Opposing Political Candidates

WISPIRG distributed Congressional Scorecards, with voting records on each of Wisconsin's United States Senators and Congressmen (Record, WISPIRG tab. Set of Documents #3). The Scorecard states that "PIRG's priorities for the 104th Congress include defending the Safe Drinking Water Act, Clean Water Act, Endangered Species Act and other environmental laws, cutting "polluter pork subsidies," reforming our campaign finance laws, and protecting consumers from unsafe products and unfair practices." *Id.*

Each of Wisconsin's Congressmen were rated based on their votes on 18 bills and the Senators on 13 bills. They were each given a "+" if the lawmaker "supports public interest position" and a "-" (minus sign) if the lawmaker "does not support public interest position." The pluses and minuses are

tallied and the lawmaker was given a percentage to show how closely he followed the WISPIRG line. *Id.*

WISPIRG's positions included opposition to NAFTA, opposition to caps on damage awards in medical malpractice lawsuits, "protecting children and the elderly" (as defined by WISPIRG), support for "national service" and support for the motor voter law. Here is a listing of WISPIRG's ratings for most of Wisconsin's Congressional delegation: *Id.*[1]

Sen. Russell Feingold (Democrat)	92%
Sen. Herb Kohl (Democrat)	77%
Rep. Gerald Klecka (Democrat)	89%
Rep. David Obey (Democrat)	72%
Rep. Scott Klug (Republican)	50%
Rep. Tom Petri (Republican)	33%
Rep. Toby Roth (Republican)	33%
Rep. James Sensenbrenner (Republican)	28%
Rep. Steve Gunderson (Republican)	17%

Response: DISPUTED. The scorecards plaintiffs rely on are not prepared or distributed by the Wisconsin Student PIRG (Schumann aff., ¶ 11). No segregated fee funds were used to produce or distribute those materials (Schumann aff., ¶s 11, 13).

Plaintiffs' Proposed FOF ¶ 7:

The WISPIRG newsletter (Record, WISPIRG tab, Set of Documents #4) contains on its last page another Congressional scorecard, called a Midterm Report. It rates all of Wisconsin's Senators and Congressmen according to their votes on various pieces of federal legislation that WISPIRG

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[1] At the time plaintiffs collected this evidence, the campus WISPIRG office at UW-Madison did not have rating sheets available for the other congressmen from Wisconsin.

supports or opposes. WISPIRG designated a lawmaker's vote in favor of WISPIRG's position with a "plus" sign and a vote contrary to WISPIRG's views with a "minus" sign.

Response: DISPUTED. The WISPIRG Newsletter plaintiffs rely on is not a publication of the Wisconsin Student PIRG and is not funded by student fees from the UW-Madison (Schumann aff., ¶s 11, 13).

Plaintiffs' Proposed FOF ¶ 8:
WISPIRG Political Lobbying at the Federal Level

WISPIRG reports in its newsletters its significant amount of political lobbying, organizing and activism. The Winter 1996 WISPIRG newsletter (Record, WISPIRG tab, Set of Documents #4) reports lobbying on the following bills:

- lobbying Congressmen on the federal Safe Drinking Water Act
- petition drive to remove riders from EPA spending bill—
- lobbying to stop weakening of federal Clean Air Act
- work for federal campaign spending reform
- stop efforts to rollback federal Endangered Species Act
- defend federal banking law known as the Truth in Savings Law

Response: DISPUTED. The Wisconsin Student PIRG is not lobbying at the federal level. No UW-Madison student activity fee funds any of this federal lobbying (Schumann aff., ¶s 5, 6, 10, 11).

Plaintiffs' Proposed FOF ¶ 9:
"Cutting Polluter Pork"

WISPIRG lobbied to stop federal spending "on corporate welfare to polluting industries." (Record, WISPIRG tab, Set of Documents #6) According to WISPIRG, examples of this corporate welfare include:

- the Mining Act of 1872, which allows companies to purchase land very cheaply;
- federal government subsidies of nuclear reactor development
- federal agricultural subsidies for tobacco and sugar cane, and which also go to pesticide-intensive companies such as Gallo Wine and Sunkist.
- federal coal subsidies, which are bad because burning coal produces acid rain;
- allowing private ranchers to graze cattle cheaply on federal lands;
- federal subsidies to timber companies that "cut down our national forests"
- tax breaks to oil and gas companies that pollute the air when their fossil fuels are burned.

Response: DISPUTED. *See* Response to plaintiffs' FOF ¶ 9.

Plaintiffs' Proposed FOF ¶ 10:
Earth Week 1995

WISPIRG, the UW Greens and others sponsored Earth Week 1995. (Record, WISPIRG tab, Set of Documents #8) One of the major events occurred on April 21, 1996.

WISPIRG and the UW Greens led a "Wisconsin Earth Day March" to the State Capitol to protest Governor Tommy Thompson's budget. Rather than protest the budget by burning it (as Vietnam War protectors did to draft cards during the 1960's), the members of WISPIRG and the UW Greens pursued a more environmentally correct course of protest and "composted" the budget once they reached the Capitol building.

Response: Plaintiffs indicate that the identified groups sponsored Earth Week 1995 and yet the referenced event took place on April 21, 1996. Defendants DO NOT DISPUTE the fact that a march took place, but there is no indication in the documents submitted by plaintiffs that any student activity fee funds were spent on the march.

Plaintiffs' Proposed FOF ¶ 11:
Lobbying by Student Interns

WISPIRG conducts an internship program that uses students to promote WISPIRG causes. (Record, WISPIRG tab, Set of Documents #5 and #7). Students work to promote the federal Right to Know Act (dealing with toxic chemicals), campaign spending reform, reauthorization of the Endangered Species Act and work to oppose Exxon's Crandon Mine.

Response: For purposes of this motion, NOT DISPUTED. With the support of UW-Madison faculty, Wisconsin Student PIRG is able to offer "students the opportunity to work on issues they care about while gaining experience outside the classroom and making a valuable contribution to the community" (*id.*). Plaintiffs' brief recommends such internships (Plaintiffs' Br. at 41).

Plaintiffs' Proposed FOF ¶ 12:
Opposition to Highway 12 Expansion

WISPIRG opposes the federal government's efforts to expand U.S. Highway 12 from 2 lanes to 4 lanes. WISPIRG claims that the environment will be harmed if the highway is widened. (Record, WISPIRG tab, Set of Documents #9)

Response: DISPUTED. The document plaintiffs rely upon is a news item apparently printed off of the Internet. There is no indication that the Wisconsin Student PIRG opposes the highway expansion; there is only a statement by an employee of Wisconsin State Public Interest Research Group about why students should care. Furthermore, there is no indication that any student activity fee funds went to support this article in a city newspaper.

Plaintiffs' Proposed FOF ¶ 13:
Lesbian. Gay, Bisexual Campus Center

The Lesbian, Gay, Bisexual Campus Center received $22,042.00 from the segregated fee during the 1995-96 school year (Record, LGB Center tab, Set of Documents #1). It provides "direct social and educational support services to the LGBT [lesbian, gay, bisexual, transgender] community, and the campus at large and advocates for gay-positive University policies." (Record, LGB Center tab, Set of Documents #5, p. 2).

Response: For purposes of this motion, NOT DISPUTED. The Center's Constitution state's its purpose as follows: "The mission of the LGB Campus Center shall be to provide direct and non-political educational, social and support services to the students, faculty and staff, of the University of Wisconsin-Madison; to enhance their visibility and voice; and to promote the diversity of ideas within the spectrum of lesbian, gay and bisexual community." (Ullman, Aff., Attachment B —

Constitution of the Lesbian, Gay & Bisexual Campus Center, Art. II.)

Plaintiffs' Proposed FOF ¶ 14:

The LGB Center promotes its pro-homosexual views through a speakers bureau, a newsletter and a Coming Out Week. (Record, *Id.* and LGB Center tab, Set of Documents #3, p. 1 and Set of Documents #4). The LGB Center's newsletter, called "Queer Campus News," states that during the "Coming Out Week" planned for October 7-13, 1996, "the queer campus will be filled with dancing, political activism, informational seminars and social events" (LGB Center tab, Set of Documents

#3, p.1).

Response: DISPUTED IN PART. The LGB Center does not "promote" homosexuality, its "mission" is to "address the needs of lesbian, gay bisexual, and transgendered members of the student body at UW-Madison" (Ullman Aff., Attachment C — LGB Campus Center brochure). The services it offers include Referrals, Buddy\Mentor program, Speakers Bureau and publication of Queer Campus News. (*Id.*)

Plaintiffs' Proposed FOF ¶ 15:

The LGB Center received additional funding in the form of an ASM event grant of $1,000.00 from the segregated fee to sponsor a speech by Leslea Newman, entitled, "Heather's Mommy Speaks Out" and a reading about lesbian identity and AIDS. Her speech would concern "how homophobia is perpetuated in our society and affects us all" and "how AIDS in general has affected the queer community,"(Record, LGB Center tab, Set of Documents #6) The Campus Women's Center and the Ten Percent Society also endorsed this speech. *Id.*

Response: Other than to note that the three identified groups sponsored, rather than "endorsed," Ms. Newman's lecture, for purposes of this motion, NOT DISPUTED. (Plaintiffs' Document Set, LGB Center tab, Document #6).

Plaintiffs' Proposed FOF ¶ 16:
Promoting Pro-Homosexual Religious Groups

In its December 1995 newsletter, the Lesbian Gay Bisexual Center promoted religious groups that support homosexuality. LGB Center tab, Set of Documents #2, p. 4). The first article promoted the religious organization called, "Coming Out, Coming Together." which is "an interfaith organization of faith communities that are supportive of gay, lesbian, bisexual, and transgender persons." The LGB Center newsletter said this group promotes pro-homosexual worship services and said that the group's activities might include "attending events where homosexuality is being challenged on religious grounds...." *Id.*

Response: DISPUTED IN PART. The Newsletter does not "promote" certain religious groups, it only informs students of these organizations. (Plaintiffs' Document Set, LGB Center tab, Document #2 at 4).

Plaintiffs' Proposed FOF ¶ 17:

Another article promoted "Integrity/Dignity," which is "a gathering of gay, lesbian, bisexual and transgendered Catholics and Episcopalians." *Id.* This is a religious support group. "The group meets twice a month for liturgy to fulfill the spiritual needs that we all have, often because our home parishes and churches do not meet these needs." *Id.*

Response: DISPUTED IN PART. The Newsletter does not "promote" certain religious groups, it only informs students of

these organizations. (Plaintiffs' Document Set, LGB Center tab, Document #2 at 4).

Plaintiffs' Proposed FOF ¶ 18:
Promoting Pro-Homosexual Political Activism

A third article promoted homosexual political activism. The newsletter included an article on "Action Wisconsin," which claims to be the "only statewide GLBT [gay, lesbian, bisexual and transgender] political organization." *Id.* The article urges people to "get involved in the political ACTION agenda" and to "[b]e a part of Wisconsin's GLBT power." The group's political agenda includes "family recognition, HIV issues, youth issues, fighting the radical right, and protection and expansion of GLBT civil/legal rights." Also, the article says that "[v]isible, effective participation in the 1996 election season is our top ACTION priority now." *Id.*

A fourth article praised Maine voters for defeating a ballot measure that would have prohibited the state from adding "sexual orientation" to the protected classes under its antidiscrimination law.

Response: DISPUTED IN PART. The Newsletter provides a forum for people who submit their opinions (Ullman Aff., Attachment C — LGB Campus Center brochure). The articles described do not purport to be the views of the LGB Campus Center, but those of the authors. (Plaintiffs' Document Set, LGB Center tab, Document #2)

Plaintiffs' Proposed FOF ¶ 19:
Campus Women's Center

The Campus Women's Center received $34,200.00 from the segregated fee during the 1995-96 school year (Stipulation 17). The Campus Women's Center was created in 1983 "as a student organization committed to working against sexist

attitudes and behaviors in order to strengthen the entire community." (Record, Campus Women's Center tab, Set of Documents #6, p. 2).

Response: DISPUTED IN PART. Plaintiffs have submitted an outdated document. The Campus Women's center's current brochure states: "The University of Wisconsin-Madison Campus Women's Center (CWC) was created in 1983 as a student organization committed to empowering women in order to strengthen the entire community. The purpose of our work is to provide a variety of women centered support services, to educate the campus community on a number of women's issues, and to serve as a resource and referral center for all students." (Ullman aff., Attachment D — UW-Madison Campus Women's Center brochure).

Plaintiffs' Proposed FOF ¶ 20:
Political Advocacy on Abortion

The Campus Women's Center publishes a bimonthly newsletter called, "The Source." In its February/March 1996 issue, (Record, Campus Women's Center tab, Set of Documents #3, p. 6) the newsletter printed a lengthy article opposing Assembly Bill 441. called the "Informed Consent" bill, which would require medical personnel to supply certain information to a woman seeking an abortion, and impose a 24-hour waiting period before the woman could abort her unborn child. The article criticized AB 441 sharply and ended with this paragraph:

> We must act now to block the bill. You can obtain a copy of the bill at the Legislative Reference Bureau. Familiarize yourself with its contents and get prepared to defend women's rights to reproductive choice when the bill hits the Senate floor in March. For more information or to find how you can become further involved, contact Jennifer at the Campus Women's Center: 262-8093."

The Campus Women's Center newsletter also urged defeat for a bill to make it a crime to kill an unborn child through a method other than abortion (Record, Campus Women's Center tab. Set of [Documents #4, p. 6-7) and urged support of a bill that would "protect free access to medical facilities." *Id.* at 7.

Response: DISPUTED IN PART. The Campus Women's Center has never taken a position on abortion (Onkeles Aff. ¶ 7). The opinion expressed is that of the author of the article. (*Id.* ¶ 6.) The newsletter provides a forum for the expression of the author's views. (*Id.* ¶ 5.)

Plaintiffs' Proposed FOF ¶ 21:
Political Advocacy - Same Sex Marriage

The May 1996 edition of the Campus Women's Center's newsletter discussed attempts in the Wisconsin Legislature to ban same-sex marriages. The author of the article, State Rep. Tammy Baldwin, urged the readers to oppose these efforts which she claims are based on "fear and hate," and to support legislation recognizing same-sex marriages. (Record, Campus Women's Center tab, Set of Documents #4, p. 7-8).

Response: DISPUTED IN PART. The referenced article is written by a legislator and reflects her views. The Campus Women's Center does not advocate same sex marriages (Onkeles Aff. ¶ 8).

Plaintiffs' Proposed FOF ¶ 22:
Political Art

The Campus Women's Center co-sponsored an art exhibit at the Wisconsin Union called, "Wake Up Little Susie: Pregnancy and Power Before *Roe v. Wade*" and another

exhibit called, "Warnings." The exhibits were also funded by an ASM Event Grant of $1160.00. (Record, Campus Women's Center tab, Set of Documents #7).

"Wake Up Little Susie" addresses unwanted pregnancy by white and black women in pre-*Roe* America. The application includes a review of these two exhibits called "Grid of Choice" by Ann Elliott Sherman. She described how the artist of "Warnings" made that piece of art work because the artist was outraged how anti-abortion activists insisted that the killing of unborn children via abortion was like the Nazis' murder of Jews during World War II. She was so irate over this comparison, that she created "Warnings" to refute what she thought to be a false comparison between the Nazi Holocaust and abortion in the United States (Record, Campus Women's Center tab, Set of Documents #7, attachment to application for funding, review from San Jose publication captioned, "Grid of Choice"):

> The accompanying exhibit of computer-montage posters by Lisa Link, *Warnings, is* the work of a Jewish feminist enraged by anti-choice propaganda, equating abortion with the Holocaust and abortion-rights activists with Nazis. As her own corrective, Link embarked upon two years of research and dug up Third Reich pamphlets, posters, speeches and writings that she graphically juxtaposes with modern-day expressions of the conservative, anti-choice persuasions.
>
> The comparison of Randall Terry of Operation Rescue with Adolf Hitler or Joseph Goebbels may offend some, but the parallels in their messages are hard to refute. And the show is not without touches of humor — the mock Western movie poster portraying Supreme Court Justice Rehnquist and

> O'Connor as gunslingers shooting down reproductive rights is hilarious. Link's work is viscerally effective and direct, in the tradition of political poster art, taking no prisoners and mincing no words.

The Campus Women's Center was also a sponsor of the "Third Annual Gay and Lesbian Film Festival," along with the Gay, Lesbian and Bisexual Campus Center and the Ten Percent Society (which are also groups receiving funding from the segregated fee). This film festival, which occurred on April 18 and April 25, 1996, included a number of pro-homosexual movies. (Record, Campus Women's Center tab, Set of Documents #2)

Response: NOT DISPUTED. Defendants do not dispute that the Campus Women's Center co-sponsored these art and film exhibitions. However, that does not mean that the Campus Women's Center has endorsed the speech in those productions. Regarding the Ten Percent Society's self-funding of its Fall and Spring "series" (*see* Defendants' RFOF ¶s 33-35).

Plaintiffs' Proposed FOF ¶ 23:
Advocacy of Homosexuality

The Campus Women's Center also cosponsored the speech on lesbianism by Leslea Newman along with the Lesbian Gay Bisexual Center and the Ten Percent Society (Record, Lesbian, Gay, Bisexual Center tab, Set of Documents #1).

During the Spring 1996 semester, the Campus Women's Center offered six women's support groups. Two concerned eating disorders, one was named, "Beyond Depression," two were on female empowerment and maintaining healthy relationships. The last was a "Bisexual Women's Discussion

Group," with discussions on similarities and differences between bisexual and lesbian women, and opinions of bisexuality within the LGB community." (Record Campus Women's Center tab Set of Documents #4).

The Campus Women's Center contains a literature rack. One pamphlet was entitled,"Introduction to Lesbian Families." (Record, Campus Women's Center tab, Set of Documents #3).

Response: DISPUTED IN PART. The fact sheet on Lesbian Families is not printed by the Campus Women's Center and was not paid for by segregated fees (Onkeles aff., ¶ 9). It was only one of over 70 pamphlets available on a bureau in the hallway of the Campus Women's Center, as part of the Center's information resources (Onkeles aff., ¶ 9).

Plaintiffs' Proposed FOF ¶ 24:
UW Greens

The UW Greens received $6,905.00 from the segregated fee during the 1995-96 school year. (Stipulation 17). The group formed at Madison in 1988 as an outgrowth of the West German Greens movement. (Record. UW Greens tab. Set of Documents #2). The UW Greens describe themselves as part of a movement that "provides an opportunity for the merger of spiritual, community and alternative institutions. This synthesis, in combination with political action, will ultimately lead to the changes which are necessary in society if we are to maintain the earth and its inhabitants." *Id.*

Response: For purposes of this motion, NOT DISPUTED.

Plaintiffs' Proposed FOF ¶ 25:
Political Lobbying

Although the UW Greens claims that it is not a political party, it has lobbied the Legislature to pass certain bills.

Along with WISPIRG and the Progressive Student Network (groups both funded by the segregated fee), the UW Greens convinced members of the Wisconsin Legislature to introduce three bills on their behalf to limit mining in the state — Assembly Bills 336, 338 and 339. (Record, WISPIRG, Set of Documents #1).

Response: DISPUTED IN PART. The UW Greens did co-sponsor the indicated legislation, however, the UW Greens did not convince members of the Wisconsin Legislature to introduce these bills. Representative Spencer Black contacted UW Greens and asked if it would join many other organizations and individuals in co-sponsoring the bills. Peck Aff. ¶ 5. No funds received from student activity fees funded the co-sponsoring of the legislation. *Id.* ¶ 9.

Plaintiffs' Proposed FOF ¶ 26:
Support of Green Party and Presidential Candidate Ralph Nader

The UW Greens at their office at the Madison campus distribute literature for the Green Party USA, a political party (Record, UW Greens tab, Set of Documents #3). The UW Greens also distribute from their office campaign literature for Ralph Nader and his bid for President on the Green Party ticket (Record, UW Greens tab. Set of Documents #4 and #5).

Response: DISPUTED IN PART. The UW Greens does not prepare or distribute literature for the Green Party or for Ralph Nader and the referenced documents were not funded by GSSF funds (Peck. Aff. ¶ 7). UW Greens does have that literature available in its files, along with the literature of a whole range of political organizations (*Id.*).

Plaintiffs' Proposed FOF ¶ 27:
Political Advocacy

The UW Greens have also urged people to oppose development of the Crandon Mine in Forest County, Wisconsin (Record, UW Greens tab, Set of Documents #6), opposed use of Bovine Growth Hormone in milk and Dairy Products (Record, UW Greens tab, Set of Documents #7), urged people to boycott Shell Oil and embargo Nigerian exports because of Nigeria's alleged environmental and human rights abuses. (Record, UW Greens tab, Set of Documents #8) and to oppose "Structural Adjustment Programs" imposed by the World Bank on poor Third World nations that the UW Greens say rob their people "of health, education and life itself." (Record, UW Greens tab, Set of Documents #9)

Additionally, during Earth Week 95, the UW Greens, along with WISPIRG and other groups, organized a march on state capitol to compost Governor Tommy Thompson's budget, to show their opposition to it. (Record, WISPIRG tab, Set of Documents #8).

Response: For purposes of this motion, NOT DISPUTED.

Plaintiffs' Proposed FOF ¶ 28:
Madison AIDS Support Network

During the 95-96 school year, the Madison AIDS Support Network (MASN) received $26,070.00 from the segregated fee. (Attachment to Stipulations #4). This group provides "preventative services and direct care services for people with HIV disease and AIDS, their partners, their families and their friends." (MASN tab, Set of Documents #2). MASN conducts "Let's Talk About Sex Parties" in which representatives from MASN give explicit information about sex and the use of condoms. The "Let's Talk About Sex Parties" include

discussions of "Safer Sex info" and "Eroticizing Safer Sex." *Id.* This includes directions on how to use "condoms and dental dams." *Id.* The Madison AIDS Support Network also distributes condoms and pamphlets with explicit details on how to use a condom, replete with street slang for body parts and sexual activities (MASN tab, Set of Documents #3).

Response: DISPUTED IN PART. MASN is a community-based organization (Brusky aff., ¶ 3). The UW-Project at MASN received the funds indicated. The referenced Document #2 is funded by GSSF and contains the following disclaimer: "The MASN UW-Project is funded in part by ASM through the Student Services Finance Committee. ASM does not necessarily endorse the beliefs or actions of this organization." The referenced Document #3 was not funded by the UW-Project or any student fee funds (Brusky aff., ¶ 6).

Plaintiffs' Proposed FOF ¶ 29:
International Socialist Organization

During the 1995-96 school year, the International Socialist Organization received an ASM operations grant from the segregated fee of $350.00 (Stipulation Attachment #3, p. 3).

Response: For purposes of this motion, NOT DISPUTED. The group's ASM grant application shows that it received $200 for printing, $100 for equipment and $50 for subscriptions. (Plaintiffs' Document Set, International Socialist Organization tab, Set # 1, p. 3).

Plaintiffs' Proposed FOF ¶ 30:
Political and Ideological Advocacy on the Internet

The International Socialist Organization promotes socialism through debates, rallies, conferences. etc. The

organization had a web page on the Internet during the 1995-96 school year in which it espoused its various ideas:

> Although workers create society's wealth, they have no control over its production and distribution. A socialist society can only be built when workers collectively seize control of that wealth and democratically plan its production and distribution according to human needs instead of profit....
>
> Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown.
>
> The structures of their present government — parliaments, the army, the police and the judiciary — cannot be taken over and used by the working class. They grew up under capitalism and are designed to protect the ruling class against workers....
>
> The working class needs an entirely different kind of state — a worker's state based on councils of workers' delegates and a workers' militia.)

(International Socialist Organization tab, Set of Documents #2, page 3).

Response: For purposes of plaintiffs' motion for summary judgment NOT DISPUTED. To the extent plaintiffs intend to suggest that the International Socialist Organization's web site is paid for by its ASM operations grant, the documents which plaintiffs rely on do not support this conclusion. The group's operations grant provided $200 for printing ($976.00 was requested), $100 for office supplies and $50 for subscriptions. (Plaintiffs' Document Set, International Socialist Organization tab, Set #1 at 3).

In addition to the facts proposed by plaintiffs, it should be noted that according to the documents submitted by plaintiffs, the debates in which the International Socialist Organization has engaged have been "with *The Badger Herald* on issues of editorial responsibility and free speech and one with The College Republicans on the issue of welfare reform." (*Id.*, Set #1 at 2). The same documents state that the group "ha[s] also held recent panels on such issues as labor, Mexico, and Native Americans with other student groups, members of the community, and experts" and that it "regularly contribute[s] editorials and letters to campus and community newspapers to generate discussion on relevant political, social, cultural and environmental topics." (*Id.*)

Plaintiffs' Proposed FOF ¶ 31:

The International Socialist Organization opposes the Republicans' Contract on America (*Id.* at 7-8), supports affirmative action, and opposes racism, sexism and homophobia (*Id.* at 4). The International Socialist Organization, along with the UW Greens and other groups, co-sponsored a series of events on May 5-6, 1996 to celebrate International Workers Day. The events included a "Worthy Wage Rally in support of childcare workers" at the state capitol and a rally in support of workers' rights and Congressman Scott Klug's office. (International Socialist Organization tab, Set of Documents #3).

Response: For purposes of this motion, NOT DISPUTED, although it should be noted that plaintiffs' is not a complete recital of the groups or ideologies which the International Socialist Organization supports or opposes.

To the extent plaintiffs intend to suggest that the International Socialist Organization's co-sponsorship of a series of events to celebrate International Workers Day was

funded, in whole or in part, through the group's ASM operations grant, there is no evidence of record supporting this fact. The International Workers Day flyer which plaintiffs have submitted as evidence does not state that it was printed or paid for by the International Socialist Organization. Rather, the student group is listed as one of 34 endorsers/co-sponsors, many of which are labor unions or their locals. (Plaintiffs' Document Set, International Socialist Organization tab, Set #4 (last page)).

Plaintiffs' Proposed FOF ¶ 32:
Demonstration to Disrupt a Church Service

On April 12, 1995, the International Socialist Organization joined with others in a demonstration around a predominantly black church in Madison because it was sponsoring two speakers who oppose homosexuality. (See Affidavit of Ralph Ovadal, Record, International Socialist Organization tab, Set of Documents #2). About 400-500 demonstrators massed outside of the church, holding signs, chanting, blowing whistles, beating metal garbage can lids, etc. One of the speakers, Ralph Ovadal of Monroe, Wisconsin saw a sign that said "Don't Try to Hide Bigotry Behind a Cross — International Socialist Organization." *Id.* He obtained a video of the demonstration, which lasted about three hours.

Response: For purposes of this motion, the last three sentences are NOT DISPUTED. Defendants' understanding is that approximately five members of the student group attended the demonstration. To that extent, the first sentence is NOT DISPUTED. Plaintiffs' affiant, Ralph Ovadal, is not competent to testify as to the student group's participation in the demonstration other than his seeing a single sign bearing the group's name.

To the extent plaintiffs intend to suggest that the demonstration or even the sign were funded by the group's ASM grant, the documents submitted by plaintiffs do not show this. While the group's grant application indicates an anticipated expenditure of $146 for equipment (listed as "banner supplies (fabric, glue, wooden poles, stencils, and pencils) = approximately $50.00 per banner, poster board (white) @.60/sheet x 10 x 12 public events = 72.00[,] Papermate markers (various colors) @ 1.00/ea. x 24 = 24.00"), the group did not request and did not receive ASM funding for this part of its expenses. (Plaintiffs' Document Set, International Socialist Organization tab, Set #2, pp. 3, 7).

Plaintiffs' Proposed FOF ¶ 33:
Ten Percent Society

During the 1995-96 school year, the Ten Percent Society received an ASM operations grant of $550.00. (Stipulation Attachment #3, p. 4). The Ten Percent Society is a pro-homosexual group [which] works "to ensure that LGB's [lesbians, gays and bisexuals] have a study environment free of homophobia and harassment. We envision a day when all barriers between LGB's and straight people have fallen and we can all be ourselves without fear of verbal or physical abuse." (Record, Ten Percent Society tab, Set of Documents #1, p. 1).

Response: For purposes of this motion, NOT DISPUTED. The statement of the group that plaintiffs quote in this proposed finding concludes: "We educate students, faculty, & staff by going into the community on campus in the form of discussion panels in classrooms, dorms and anywhere else that is requested. We also do annual series that work toward this end." (Plaintiffs' Document Set, Ten Percent Society tab, Set #1, p. 1).

It should be noted that although the Ten Percent Society received an ASM grant of $550 in 1995-96, its budgeted income for the year from other sources—principally its revenues from sponsoring dances—totaled $13,000. (Plaintiffs' Document Set, Ten Percent Society tab, Set #1, p. 4). The $550 that the group received through ASM funding was for postage and office supplies. (*Id.*, p. 1). Funding was not requested or received for printing, promotion or equipment rental. (*Id.*, pp. 1, 3).

Plaintiffs' Proposed FOF ¶ 34:
Political Advocacy

The Ten Percent Society stated in its application for ASM funding that it has "also been active in the political arena as necessary. In the past we have struggled against homophobia in the military and on campus, we have held candidate forums for student areas, and we have gone head to head with the administration as is becoming necessary again. In the future we will continue are [sic, "our"] newly begun attempt to get domestic partner insurance by networking with as many students as are willing." *Id.* at 3.

In the Ten Percent Society's web site on the Internet, it frequently urges support of same sex marriage and its opposition to attempts in the Wisconsin Legislature to ban same sex marriage. (Record, Ten Percent Society tab, Set of Documents #5, p. 4-5).

Response: For purposes of this motion NOT DISPUTED. It should be noted that plaintiffs' quotation of the group's statement of what it has done in the past and what it envisions doing in the future consists of the group's activities "[o]ther than educational activities". (Plaintiffs' Document Set, Ten Percent Society tab, Set #1, p. 2). Accordingly, the quoted portion does not encompass all of the group's activities.

To the extent plaintiffs intend to suggest that the group's web site is funded through its ASM operations grant, the documents submitted by plaintiffs do not support this conclusion. The $550 that the group received through ASM funding was for postage and office supplies. (*Id.*, p. 1). Funding was not requested or received for printing, promotion or equipment rental. (*Id.*, pp. 1, 3).

Plaintiffs' Proposed FOF ¶ 35:
Ideological Advocacy of Homosexuality

The Ten Percent Society annually presents "Out and About" conferences described as its "annual spring LGBT [lesbian, gay, bisexual, transgender] awareness series of noted speakers, entertainers and films." (Record, Ten Percent Society tab, Set of Documents #5, p.1). This event included brown bag discussions and lectures, such as State Rep. Tammy Baldwin, "Wisconsin's only openly gay state legislator" who fights "for the rights of same-sex couple[s] to marry in the state of Wisconsin." *Id.* at 4.

At the 1995 Out and About conference, the Ten Percent Society sponsored at [sic] speech by Ann Northrop, described as the "Dyke activist from hell." (Record, Ten Percent Society tab, Set of Documents #2).

Response: For purposes of this motion, NOT DISPUTED. However, to the extent plaintiffs intend to suggest that the group's "Out and About" conferences are funded by its ASM grant, the documents submitted by plaintiffs do not support this conclusion. As previously noted, the group did not seek or receive any funding for printing costs or promotion for 1995-96, although its budget for these expenditures were $369 and $1070, respectively. (Plaintiffs' Document Set, Ten Percent Society tab, Set #1, pp. 3, 4, 6). The group's expenses for film projectors and video tape players were also

self-funded. (*Id.* at 6). The group's budget for its fall and spring "series" in 1995-96, totaling $3,610 and $4,000, respectively, appears entirely self-funded, with no financial support requested or obtained from an ASM grant. (*Id.* at 7).

Plaintiffs' Proposed FOF ¶ 36:
Opposition to evangelical Christianity

The Ten Percent Society also vehemently opposed the request by an evangelical Christian campus group's request for an ASM operations grant, like the one the Ten Percent Society receives. The student government in the end rejected the request for funding by Chi Alpha, an Assemblies of God group. The Ten Percent Society opined on its home page on the Internet that it would be illegal and unconstitutional to fund the proselytizing and anti-homosexual advocacy of such an evangelical Christian group.(Record, Ten Percent Society tab, Set of Documents #6, p. 1-2). The Ten Percent Society said it had filed 9 complaints against the church group for violating University policy, which resulted in Chi Alpha losing its status as a Registered Student Organization, and therefore, its ability to receive grants from the segregated fee fund. *Id.* at 2.

Response: Subject to the qualification that the last three sentences appear to be offered to show what the Ten Percent Society has said, rather than for the truth of the matters stated, for purposes of this motion, NOT DISPUTED.

Plaintiffs' Proposed FOF ¶ 37:
Progressive Student Network

During the 1995-96 school year, the Progressive Student Network received an ASM operations grant of $590.00. (Stipulation Attachment #3, p. 4). This activist group "focuses on a wide variety of current issues including military/biotech research on campus, ROTC discrimination against queers,

racist mascots in sports, the crisis of hunger and homelessness, free trade (NAFTA/GATT), welfare reform, political prisoners and prison organizing, environmental racism, ecofeminism and women's empowerment, right wing backlash on campus, the GOP 'Contract on America,' etc.... We also publish our popular 'UW Disorientation Manual.'" (Record Progressive Student Network tab, Set of Documents #1, p. 1).

Response: For purposes of this motion, NOT DISPUTED. The documents plaintiffs have submitted show that the group's ASM grant covered $300 for printing, $150 for postage, $50 for office supplies and $90 for equipment rental. (Plaintiffs' Document Set, Progressive Student Network tab, Document #1, pp. 1, 3). The equipment rentals are shown to be for four VCR rentals and two video projector rentals. (*Id.*, p. 6).

Plaintiffs' Proposed FOF ¶ 38:

The Progressive Student Network joined with WISPIRG and the UW Greens to convince Wisconsin legislators to introduce three bills to limit mining in the state. (Record, WISPIRG tab, Set of Documents #2).

Response: DISPUTED IN PART. This student group was one of many organizations solicited by Representative Black to co-sponsor the legislation. No ASM funds were expended in the co-sponsorship (Peck aff., ¶ s 5, 9).

Plaintiffs' Proposed FOF ¶ 39:

The Progressive Student Network distributes its Disorientation Manual at the UW-Madison campus. (Record, Ten Percent Society tab, Set of Documents #2). The back page of the Disorientation Manual states that it is "funded by the Associated Students of Madison. The ASM does not necessarily endorse this organization or its beliefs."

Response: For purposes of this motion, NOT DISPUTED.

Plaintiffs' Proposed FOF ¶ 40:

The Disorientation Manual addresses its topics in a scoffing, anti-authority point of view ("fart in the face of authority"). *Id.* at 2. The Manual criticizes and mocks the Board of Regents and

Governor Tommy Thompson for the way they spend money on projects and programs at the University. The Disorientation Manual promotes its views of multiculturalism with statements such as "Fuck White Supremacy." *Id.* at 7. It also promotes homosexuality (*Id.* at 20):

> Congratulations! You've stepped out of whatever homohating hometown you probably "grew up" in and have come to the only Midwestern mecca where gay rights exist, bisexuals can flirt shamelessly, and our family is so comfortable that we can even afford that sociopolitical luxury of infighting.
>
> Of course, isn't it odd that the military Reserve Officer Training Corps (ROTC) openly discriminates against homosexuals but is still allowed on campus (despite UW policy). Also, spouses of UW students get UW health benefits, while legally-sanctioned "domestic partners" (the only way for homosexuals to marry in WI) of UW students don't.

The Manual contains many other scathing attacks on UW athletics, fraternities, etc.

Response: For purposes of this motion, NOT DISPUTED.

Plaintiffs' Proposed FOF ¶ 41:
Amnesty International

During the 1995-96 school year, Amnesty International received an ASM Operations Grant of $625.00 and a Travel Grant of $330.00, both of which come from the segregated fee (Stipulation Attachment #3, p. 1 & 2). Amnesty International works for human right in nations around the world. Amnesty International opposes the death penalty in all cases. (Record, Amnesty International tab, Set of Documents #1 and #2). Therefore, if a nation executes any criminals for any reason, including conviction of murder under sufficient due process, Amnesty International will characterize that nation as violating the human rights of its citizens.

Response: For purposes of this motion, NOT DISPUTED. The group's ASM operations grant application shows that it received $125 for printing, $250 for postage, $20 for office supplies, $100 for dues, $20 for subscriptions, $150 for equipment rental and $20 for promotion. (Plaintiffs' Document Set, Amnesty International tab, Set #1, pp. 1, 3).

In its grant application, the group describes what it has done in the past and what it envisions doing in the future as follows:

> We hold weekly meetings in which we try to educate ourselves on new cases of human rights violations. Our fundamental campaign is the letter writing Urgent Action in which we receive two actions a week focusing on pressing issues of human rights violations around the world, and we write letters to these countries urging them to respect the human rights of these prisoners. We try to plan events to raise awareness for the student body, and our successes in the past have included bringing a

> Haitian refugee to campus to talk about the atrocious violations in her country; weekly tutoring of the local Hmong community and trying to coordinate activit[i]es for them outside of their community center; host discussion and panels about certain countries including Burma, East Timor and Colombia. We are in the midst of trying [to] raise money for an orphanage in Zimbabwe, and we are also trying to coordinate activities on the university campus to raise awareness on the death penalty legislation here in Wisconsin. All in all, our approach and purpose is educational, and we try our best to raise awareness about the human rights situation all over the world.

(*Id.*, p. 2).

Plaintiffs' Proposed FOF ¶ 42:
United States Student Association

The UW-Madison chapter of the United States Student Association (USSA) received $38,000.00 from the segregated fee during the 1995-96 school year (Stipulation 17). USSA "is the nation's oldest and largest student membership and advocacy organization." (Record, USSA tab, Set of Documents #1). According to its literature, USSA members "receive legislative information, representation before Congress and governmental agencies, skills training, conferences and internships." *Id.* Its membership includes a"Lesbian/Gay/Bisexual student group. *Id.*

Response: DISPUTED IN PART. Defendants have stipulated that GSSF funding of $38,000 went to USSA in 1995-96. It is incorrect to characterize this payment as going to the "UW-Madison chapter of the United States Student Association." Rather, the UW-Madison is a member of the national student organization. The documents which plaintiffs

have submitted with respect to this organization do not indicate UW-Madison student authorship. (Plaintiffs' Document Set, USSA tab). For purposes of this motion, the remainder of this proposed finding is NOT DISPUTED.

A student referendum passed on October 17, 1996, to terminate the UW-Madison's membership in USSA (Howard aff., ¶ 4). Accordingly, because plaintiffs are seeking only prospective relief, prior GSSF funding for USSA membership is no longer material.

Plaintiffs' Proposed FOF ¶ 43:
Community Action on Latin America

Community Action on Latin America (CALA) received an ASM operations grant of $450.00 during the 1995-96 school year, (Stipulation Attachment #3, p. 3) and an events grant for a speaker of $1300.00 (*Id.* at 1). In its application for funding, the organization described its purposes and political activism this way:

> CALA has been a campus and community organization at UW since the early 1970's. Our group focuses on Latin America — current issues, historical underpinnings, and USA policy towards the region. We are an activist group that meets regularly with our congressional representatives, sponsors educational initiatives on campus and hosts speakers and cultural events. Our mission is to encourage student and community dialogue and action with regard to Latin American issues.

Record, CALA tab, Set of Documents #1, p. 1.

Response: Subject to the qualification that plaintiffs are offering the group's statement of purpose as evidence of what it has said, rather than for the truth of the matters asserted, for purposes of this motion, NOT DISPUTED. (Defendants

doubt, and there is no competent evidence to show, that the group "meets regularly with [its] congressional representatives.") It should be noted that the ASM operations grant of $450 was for a part of the group's printing, postage and office supplies costs. (Plaintiffs' Document Set, CALA tab, #1, pp. 1, 4, 5). The group's printing expenses are stated to be for the purpose of "distributing more info about meetings and educational activities to those on our mailing list. Also there is a good deal of copying involved in support of our meetings." (*Id.*, p. 4). The group states that "the bulk of our mailing expenses are used in keeping [in] touch with those students and community members on our mailing list, as well as those who request information at events." (*Id.*, p. 5). The group also reports receiving a sizable grant from Community Shares. Non-ASM funding appears to provide the majority of the group's funding. (*Id.*, p. 4).

The events grant referred to in plaintiffs' proposed finding was to host a lecture by Michael Parenti, whom the group identified as the author of six books on American politics, media and foreign policy who regularly appears on radio and television programs and a popular lecturer on college campuses around the country. CALA stated Mr. Parenti's views would be of interest to a wide range of people in the campus community, including students and staff in history, political science and journalism. (*Id.*, #2, pp. 1-2). The lecture was also sponsored by Canterbury Books, *(id.*, #2, p. 3), which the Court may take judicial notice to be a private, Madison bookstore. The grant request was used to pay some or all of Mr. Parenti's honorarium or speaking fee and his travel and lodging. (*Id.*). The documents submitted by plaintiffs also state that in addition to Mr. Parenti's lecture, CALA has sponsored visits to Madison by 1992 Nobel Peace Prize winner Rigoberta Menchu Tum and human rights activist Jennifer Harbury. (*Id.*, #3).

Plaintiffs' Proposed FOF ¶ 44:

CALA has sponsored speeches by a labor organizer from Guatemala, another event by a union official from Nicaragua and a third presentation by labor organizers from El Salvador. (Record, CALA tab, Set of Documents #2, #3 and #4).

Response: For purposes of this motion NOT DISPUTED, although defendants would note that the documents that support this proposed finding appear to be #4, #5 and #6. The word "speeches" to describe these speaker's talks is not supported by plaintiffs' documents. To the extent plaintiffs intend to suggest that these events were funded in whole or in part by an ASM grant, the documents do not show this, since ASM events grant funding for the 1996-97 academic year has not been submitted. In addition, each event was co-sponsored by another organization.

Plaintiffs' Proposed FOF ¶ 45:
La Collective [sic] Cultural de Aztlan

La Collective [sic] Cultural de Aztlan received an ASM operations grant of $665.00 from the segregated fee and a travel grant of $250.00 during the 1995-96 school year (Stipulation Attachment #3, p.3). In a request for an ASM travel grant, La Collective [sic] defined itself and explained its political activism (Record, La Collective [sic] de Aztlan tab, Set of Documents #3, p. 1).

> La Collective [sic] Cultural de Aztlan was created in 1988 as a support group for Chicano/a undergraduate students at UW-Madison. We are involved in many different areas of college life. These areas include: a culture [sic], political, recruitment, and social. Politically, we have to fight for what we want. Due to student leadership and pressure, the existing Chicano Studies Program was established in the

> 1970's. We also support other off-campus political groups, such as Centro Hispano of Dane County and the United Farmworkers of America.

Response: Except that the group refers to itself as "La Colectiva" rather than "La Collective," for purposes of this motion, NOT DISPUTED. A more complete statement of the group's purpose and activities is found in its 1995-96 ASM grant application, which contains the above language and then continues:

> Recruitment-wise, we interact with the local middle and high schools through tutoring, mentoring and campus tours. We also work with the Chicano Studies Program and the Admissions Office regarding the recruitment and retention of Chicano/as and other Latino/as. Socially, we sponsor informal dances, fundraisers and get-togethers.

(Plaintiffs' Document Set, La Colectiva Cultural de Aztlan, Set #1, p. 1). The group's application gives specific examples of its past and anticipated future activities:

> In the past we have sponsored dances and other social gatherings. We have also co-sponsored a variety of art exhibits, including the Mexican Revolution Photo Exhibit which is now on display in the Porter Butts gallery of the Memorial Union. We produce a monthly newsletter that highlights poetry, prose and art by and about La Colectiva members. Politically we have been very involved in campus politics through our involvement with the Minority Coalition and the Latino/a Student Action Committee. We have co-sponsored such speakers as Dolores Huerta and the late Cesar Chavez.

> Culturally, we have co-sponsored performances by el Teatro Campesino and El Teatro de la Esperanza. We also co-sponsor the Mujer Latina Conference held every Spring on the UW-Madison campus. We are planning big-scale Cinco de Mayo celebrations, as well as various events for Latino History Month in September.

(*Id.*, p. 2).

The majority of the group's funding is not from ASM, but from Multicultural Council grant monies and fundraisers. (*Id.*, p. 4). The group's $665 ASM operations grant in 1995-96 was for the following: $400 for printing, which the group explained included "notices/announcements to publicize events, the publication of our monthly newsletter, posters produced for big-scale events, and promotional materials to publicize the organization"; $200 for postage; $50 for office supplies ("pens/pencils, notepaper, computer diskettes, tapes, glue, paper clips, markers, staplers, etc."); and $15 for equipment rentals, including "equipment for forums and events, such as microphone rentals." (*Id.*, pp. 1, 4-6).

Plaintiffs' Proposed FOF ¶ 46:

La Collective [sic] also received an additional $727.00 in the form of an ASM event grant from the segregated fee for a performance of a play called, "Hispanics for Wilson: The New Agenda." (Record, La Collective [sic] de Aztlan tab, Set of Documents #2, p. 1) The application for the event grant explained that the play "is a satirical look at Proposition 187 and California Pete Wilson's '96 presidential bid." The application states that the performance will "educate the university community on the complexities and consequences of legislation such as Prop. 187 and English Only laws." La Collective [sic] said the visit by Hispanics for Wilson "will educate the UW-Madison community on the revolutionary

spirit and resistant aspects of Chicano culture and politics." *Id.*

Response: For purposes of this motion, NOT DISPUTED. Plaintiffs' documents indicate that the group estimated that 350 people would attend the event and that neither admission would be charged nor donations requested. (Plaintiffs' Document Set, La Colectiva Cultural de Aztlan, Set #2, pp. 1-2).

Plaintiffs' Proposed FOF ¶ 47:
Militant Student Union of the University of Wisconsin

During the 1995-96 school year, the Militant Student Union of the University of Wisconsin received an ASM operations grant of $375.00 from the segregated fee (Record, Militant Student Union tab, Set of Documents # 1, p.1). The Militant Student Union is a leftwing group that described its political activism this way in its application for an operations grant (*Id.*):

> The Militant Student Union works for the empowerment of and against the systematic oppression of women, minorities, and the poor in the tradition of the student left. We do not subscribe to ineffective and unchallenging tactics at most left oriented student groups on campus, and, as such, refuse to compromise our beliefs or apologize for them in any way. Neither do we sell out like the Democratic Party. We work for student solidarity and effective, drastic and permanent change in society and at the UW to alleviate the oppression of women, minorities and the poor. We intend to challenge any institution or organization, right or left, that fails to do so, by engaging in popular political pressure, demonstrations, boycotts and

> whatever means are necessary. To highlight these inequities, we will continue to hold forums, debates and speakers [sic] to expose inequality and oppression where it hides.

Response: For purposes of this motion, NOT DISPUTED. The group's ASM grant application shows that it received $150 for printing, $75 for postage, $50 for office supplies and $100 for promotion. (Plaintiffs' Document Set, Militant Student Union tab, pp. 1, 3).

This student group terminated on February 27, 1996 (Howard aff., ¶ 5). Accordingly, because plaintiffs are seeking only prospective relief, prior funding for this group is no longer material.

Plaintiffs' Proposed FOF ¶ 48:
Student Labor Action Coalition

During the 1995-96 school year, the Student Labor Action Coalition received an ASM operations grant of $265.00 (Stipulation Attachment #3, p. 4). The group is a pro-labor group that has "gathered signatures on petitions on issues of concern to students and workers, showed videos of various events involving working people, held demonstrations to raise awareness and raised funds to pursue these goals. We have also traveled to places like Decatur, IL where working people are boldly taking stands for safe working conditions and fair contracts." (Record, SLAC tab, Document #1 at p. 3).

Response: For purposes of this motion, NOT DISPUTED. Plaintiffs have partially quoted the portion of the group's ASM operations grant in which the group describes what it

has done in the past and what it envisions doing in the future. The full response reads as follows:

> We have held forums which brought professors, students and labor activists to present their ideas to the student body. We have presented information on labor events at tables in Memorial Union and in the dorms. We have gathered signatures on petitions on issues of concern to students and workers, showed videos of various events involving working people, held demonstrations to raise awareness and raised funds to pursue these goals. We have also traveled to places like Decatur, IL where working people are boldly taking stands for safe working conditions and fair contracts.

(Plaintiffs' Document Set, Student Labor Action Coalition tab, Set # 1, p. 2). The group's ASM operations grant of $265 is shown as including $200 for printing, $40 for postage and $25 for office supplies. (*Id.*, p. 1). The documents submitted by plaintiffs do not show that the group's travel to Decatur was funded, in whole or in part, by ASM funding. The group is shown as having requested $350 for equipment rental for which it explained: "One large expense in the equipment rental category is the rental of a van to transport, people and equipment for events." (*Id.*, p. 6). The group was not granted any money for equipment rental. (*Id.*, pp. 1, 3).

Plaintiffs' Proposed FOF ¶ 49:

The Student Labor Action Coalition also received an ASM event grant of $2,000.00 (along with UW Greens, Student Solidarity and others) for a conference entitled, "Youth in Action: Building for a Sustainable Society." (Record, SLAC tab, Document #2). The event, held October 6-8, 1995 had these three goals:

1. To educate students and youth on labor, education, environment and democracy issues;
2. To encourage the development of chapters of youth groups who are actively committed to a vision of a just and sustainable society;
3. To build a network of Midwestern progressive groups to coordinate activities.

The conference included "issue-oriented classes" in "global trade, trends in family farming, immigration, the labor movement, developing a sustainable economy, [and] affirmative action." (*Id.*)

Response: For purposes of this motion, NOT DISPUTED. The portion of the group's grant application, which plaintiffs partially quote in the last paragraph of this proposed finding, describes how the applicants believe the event will benefit the Madison Campus Community and reads in full:

> The conference will include a variety of workshops, both skill and issue-oriented. Skill classes will include: using the internet, how to do public speaking, how to build and run a campus group, how to work with the media, building links between grads & undergrads. Issue-oriented classes include: global trade, trends in family farming, immigration, the labor movement, developing a sustainable economy, affirmative action. Students will benefit through these classes, exposure to a wide range of speakers, meeting other students and youth from other areas.

(Plaintiffs' Document Set, Student Labor Action Coalition tab, Set #2, p. 2). Of the $2,000 ASM event grant, $200 is shown as paying part of the speaking fees of ten speakers;

$1060 is shown as paying part of the travel costs of six speakers, gas and travel expenses for approximately ten speakers and gas and travel expenses to subsidize some low income students; $400 is shown as paying for posters, pamphlets, letters, and registration materials; $50 is shown for postage; $25 for VCR rental; $40 for supplies, and $228 for advertisement in two student newspapers. (*Id.*, pp. 1, 3, 4).

Plaintiffs' Proposed FOF ¶ 50:

The Disorientation Manual, published by conference co-sponsor the Progressive Student Network, urged students to participate in this conference:

> So now that you've finished perusing this manual, hopefully you're disoriented enough to start questioning this fine University. The greed, racism, sexism, homophobia, and ecological destruction here and just about everywhere do not exist independently, but are ominously intertwined in a mess of cultural baggage.
>
> But do we just retreat with our knowledge into a coffeehouse and grumble? No — we ORGANIZE! Madison has a good reputation for activism, from the enormous protests and student strikes during the Vietnam War, to last year's rallies against purging the homeless from campus, tuition hikes, a draconian state budget, the Con_ _ act [sic] on America, and many other timely events. [the article then describes the specifics of the conference].

Record, Progressive Student Network tab, Set of Documents # 2, p. 24 (back cover).

Response: DISPUTED IN PART. It is NOT DISPUTED that the back cover of the Progressive Student Network's "Disorientation Manual" contains the language quoted in this proposed finding. It is also NOT DISPUTED that at the bottom of the back cover is a box announcing the Student/Youth Organizing Conference and the dates of the conference, in which it is stated: "Join young progressive activists from all over the Midwest for educational and skills workshops, networking, speakers and panels." However, the language quoted in this proposed finding does not appear to be referring specifically to the Student/Youth Organizing Conference. The only portion which "describes the specifics of the conference" is the information contained in the box at the end of the manual.

Plaintiffs' Proposed FOF ¶ 51:
Student Solidarity

During the 1995-96 school year, Student Solidarity received an ASM operations grant of $210.00 (Stipulation Attachment #3, p. 4). Student Solidarity wants to educate the University community about "progressive ideas for social change and to participate in implementing some of those ideas," and also educate students about the "value of a democratically organized labor movement in the contemporary U.S." (Record, Student Solidarity tab, Set of Documents # 1, p. 1). Student Solidarity was one of the co-sponsors of the conference called "Youth in Action: Building for a Sustainable Society." That conference, funded by segregated fees, is described more fully under the heading of "Student Labor Action Coalition."

Response: For purposes of this motion, NOT DISPUTED. The group's ASM grant application contains the following description of its past and anticipated future activities:

> We have held a wide variety of events, on topics such as labor law and trade union reform, Bosnia, Chiapus, health care, immigration, and free trade. We have held 2 'day-schools'- day long educational events, which students from around the midwest have attended. We have brought several prominent speakers and activists to Madison, to provide public forums and a chance for students to meet with the activist. We hold regular study groups on a variety of topics.

(Plaintiffs' Document Set, Student Solidarity tab, p. 2). The group's $210 ASM operations grant included $100 for printing, described as being for "newsletter, meeting posters, study group readings, and member mailings," $60 for postage and $50 for office supplies. (*Id.*, pp. 1, 4, 5). The group's expenditures for "events" is shown as self-funded, with the explanation: "Most of our membership dues goes to pay for bringing speakers and holding our day schools. This requires air fare, poster costs, some local transportation costs, and food expenses." (*Id.*, p. 7).

Plaintiffs' Proposed FOF ¶ 52:
Students of National Organization for Women (Student NOW)

During the 1995-96 school year, Student NOW received an ASM operations grant of $300.00 (Stipulation Attachment #3, p. 3). This group is a student adjunct to the prominent feminist organization, the National Organization for Women. Student NOW defines its purpose this way:

> We believe that all women regardless of race, class, sexual orientation, physical ability and ethnicity should be free from gender discrimination in our society. Our goals are to increase the awareness of students on issues such as violence against women, sexual harassment, wage discrimination, racism, and

> homophobia and provide opportunities to join together to fight these injustices.

Record, NOW tab, Set of Documents #1, p. 1.

Response: DISPUTED IN PART. The quotation is accurate, but not complete. The first paragraph of Student NOW's "purpose, philosophy and goals" reads as follows: "Our organization serves the purpose of educating the UW-Campus about women's rights and gender issues and empowering students with skills and strategies to affect change in our community." (Plaintiffs' Document Set, Student NOW tab, p. 1). The page of the group's ASM grant application containing the group's statement of purpose quoted in this proposed finding has the words "weak on goals/read statement" written across it. (*Id.*)

The group's description of its past and anticipated future activities reads as follows:

> STUDENT-N.O.W. formed this semester. We have: viewed a video on the depiction of women in rock videos; held a postering campaign on campus displaying brutal statistics of the discrimination of women, and held a table at the union celebrating international womens day (March 8, 1995). We intend to continue these activities, as well as presenting movies (about womens issues) to a larger student audience, holding workshops as well as seminars open to all students. We also intend to collaborate with other student organizations such as the Campus Women[']s Center on Take Back the Night and Women[']s History Month.

(*Id.*, p. 2). The group's $300 ASM operations grant is shown to cover $100 in printing costs, $50 for postage, $50 for office supplies and $100 for equipment rental. (*Id.*, p. 1).

The equipment rental expense is indicated to be for VCR rental. (*Id.*, p. 6).

Plaintiffs' Proposed FOF ¶ 53:
MADPAC

During the 1995-96 school year, MADPAC received an ASM operations grant from the segregated fee of $100.00 (Stipulation Attachment #3, p. 3). In its application for funding, MADPAC described its political activism:

> Our organization seeks to engage students in political action and provide a forum for discussion based on an interest in Israel and the regional peace process.

Record, MADPAC tab, Set of Documents #1, p. 1).

Response: DISPUTED IN PART. The portion of the group's description of its purpose that is quoted is accurate but not complete. The full statement reads as follows:

> Our organization seeks to engage students in political action and provide a forum for discussion based on an interest in Israel and the regional peace process. To accomplish this goal, the organization provides its members with current information and materials, and guest speakers. We hope to stimulate a greater awareness and understanding of these issues among the campus community.

(Plaintiffs' Document Set, MADPAC tab, p. 1). The group explained what it has done in the past and plans to do in the future as follows:

> We have organized programs, allowing students to learn and participate. Recent events have included bringing various state and local political candidates to campus and the consulate-general of the Israeli embassy. We have co-sponsored a variety of

> activities with other campus groups such as the Black Student Council, College Republicans and the Political Science Honors Society.
>
> In the future we plan to continue bringing relevant speakers to address the students of Madison. We also intend to organize other activities inviting students both within and outside of the group.

(*Id.*, p. 2). The group's $100 ASM operations grant is shown as covering $50 for printing and $50 for office supplies. (*Id.*, pp. 1, 3).

Plaintiffs' Proposed FOF ¶ 54:
Madison Treaty Rights Support Group

During the 1995-96 school year, Madison Treaty Rights Support Group received an ASM operations grant from the segregated fee of $435.00 (Stipulation Attachment #3, p. 3). This group works "to organize the non-Indian community in support of Native American rights." (Record, Madison Treaty Rights Support Group tab, Set of Documents #1, p. 1). The group's two goals are (*Id.*):

> 1) To increase awareness and understanding of Native American issues (such as mining, religious freedom, and harvesting rights) by educating students and the larger Madison community on current issues.
>
> 2) To take social and political action on these issues through rallies, vigils, letter writing campaigns, etc.

Response: For purposes of this motion, NOT DISPUTED. The group's application also describes it past and anticipated future activities as follows:

In the past we have increased awareness and understanding of Native American issues through our Native American Resource Library which offers books, videos, and curriculum kits. This summer we co-organized the Protect the Earth conference, which brought in speakers from Alaska to Columbia. We put out a regular newsletter and printed out detailed pamphlets and information sheets on current issues. We have brought several speakers to Madison this school year, and we have helped organize rallies and press conferences. In the future we hope to maintain regular office hours for our library, and improve the awareness on campus of this tremendous resource in addition to continuing our educational efforts.

(Plaintiffs' Document Set, Madison Treaty Rights Support Group tab, Set #1, p. 2). The group's application shows budgeted expenses of $2,260 in 1995-96. The group's ASM operations grant of $435 is shown as having been for $200 in printing costs, $100 for postage, $36 for office supplies and $99 for equipment rental. (*Id.*, p. 1). Postage (for which $522 was requested) is shown as covering the cost of four newsletter mailings and three calendar update mailings. (*Id.*, pp. 4-5). Equipment rental is indicated to be for video equipment "to show informational videos at our upcoming meetings and at a table at the Union." (*Id.*, p. 6).

Plaintiffs' Proposed FOF ¶ 55:

The Madison Treaty Rights Support Group distributed a brochure describing its lobbying on political matters.

> Lobbying
>
> In Madison, we have a special responsibility to influence state government. We have worked with

> the HONOR network to get Indian curriculum into the public schools and to counter racist acts by company and government officials. We have worked with the Wisconsin 1992 Alliance to stop the renaming of a local road as Columbus Highway and to reform the state Quincentennial Committee. We have also distributed information on mining to legislators and the state media.

Record, Madison Treaty Rights tab, Set of Documents #2, p. 2.

Response: For purposes of this motion, NOT DISPUTED. The document specifically states that it is "Funded by the Associated Students of Madison. The ASM does not necessarily endorse this organization or its beliefs." (Plaintiffs' Document Set, Madison Treaty Rights tab, Set # 2, p. 1). The documents provided by plaintiffs do not show, however, that the group's "lobbying" was funded in whole or in part by ASM funding. The description of expenditures for which ASM funding was received does not suggest such funding. (*Id.*, pp. 4-6).

ADDITIONAL FINDINGS OF FACT PROPOSED BY DEFENDANTS

¶ 1.A. All materials printed with ASM funds must contain a disclaimer that the funded organization's views are not those of ASM (Ullman aff., Attachment A — Associated Students of Madison Bylaws at Bates #51-52).

¶ 2.A. The Associated Students of Madison Bylaws require all events funded by events grants to be open to the entire student body (Ullman aff., Attachment A — Associated Students of Madison Bylaws at Bates #51)

¶ 3.A. The Associate Dean of Students of the UW-Madison has described how the multitude of student

organizations and activities is germane to the UW-Madison's educational goals and mission:

> Student organizations at the UW-Madison contribute significantly to the diversity and richness of the university community. Student groups provide opportunities for students to learn about specific topics and to develop teamwork and leadership skills. The more than 500 student organizations registered with the University each year also develop and present most of the many out-of-class programs available to students, faculty and staff, ranging from lectures, musical events, films, debates, dance groups, and a large array of discussion groups covering special interest or skill-building topics. Funds are required to present these programs. For example, to attract a speaker of national renown, the organization often has to cover at least the travel expenses of the speaker, if not an honorarium.

(Howard aff., ¶ 2).

¶4.A. The Associate Dean of Students at the UW-Madison described the germaneness of the role the organizations funded by GSSF play in delivering services to students, and specifically addresses those service organizations challenged by plaintiffs:

> During the past ten years, a number of student organizations have been formed to deliver particular services to students. Several of these service groups have applied for and received segregated fee allocations through the General Student Services Fund ("GSSF") to cover costs for staff, office rental, office supplies, etc. Legal assistance, tutoring, tenant information, and support for veterans are a

> few examples of these student-initiated, student-run service programs. This group of services also includes the Lesbian, Gay, Bisexual Center and the Campus Women's Center which provide information and support for LGB students and women at the University, groups that have been and may yet be targets of discrimination, attack or ignorance. For many students, these centers with their staff, small libraries, and various programs are important sources of support and serve as evidence that they are welcomed to the University community. The Madison AIDS Support Network ("MASN") is a larger community information and support organization receiving financial support from several different sources in Dane County. UW-Madison students provide segregated fee funding for additional staff to enable MASN with its county-wide responsibilities to target the University community for special efforts to provide information about AIDS to students. UW Greens and Wisconsin Student PIRG both assist students who wish to investigate environmental issues that affect the local, state, national, and international community and to consider how they might wish to become involved in seeking the resolution of the problem. WISPIRG especially has been effective in helping students identify projects that fit with their academic work in the classroom so that students can experience both service and learning around the same topic.

(Howard aff., ¶ 4).

CONCLUSIONS OF LAW

Plaintiffs' Proposed COL ¶ 1:

Plaintiffs seek prospective injunctive relief against the Board of Regents acting in their official capacity.

Response: NOT DISPUTED.

Plaintiffs' Proposed COL ¶ 2:

The University's requirement of paying the segregated fee violates plaintiffs' rights to freedom of speech, association and free exercise of religion.

Response: DISPUTED.

Plaintiffs' Proposed COL ¶ 3:

State action requires plaintiffs to pay the mandatory fee.

Response: NOT DISPUTED.

Plaintiffs' Proposed COL ¶ 4:

The University lacks a sufficient justification for the compelled association.

Response: DISPUTED.

Plaintiffs' Proposed COL ¶ 5:

The University violates the Wisconsin Constitution by using segregated fee funds for student organizations.

Response: DISPUTED.

Plaintiffs' Proposed COL ¶ 6:

Plaintiffs are entitled to summary judgment on all claims.

Response: DISPUTED.

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN
Assistant Attorney General
State Bar #1022052

PETER C. ANDERSON
Assistant Attorney General
State Bar #1017321

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

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GSSF POLICY STATEMENT

Policy Goal: To state the guidelines for the General Student Service Fund (GSSF) allocation process that will help SUFAC members to focus on priorities for dispersing limited student fees and to give an understanding to groups applying for funding what those priorities are. It is strongly intended that these are the policies approved by the members of SSFC and that these policies are revised at least annually only by SSFC members to reflect their current philosophies.

The Segregated University Fees Allocation Committee (SSFC), as defined by the ASM Bylaws, seeks to fulfill the responsibilities provided for in section 36.09(5) of the Wisconsin State Statutes: "Students in consultation with the chancellor and subject to the final confirmation of the Board shall have the responsibility for the disposition of those fees which constitute substantial support for campus student activities...." In addition, SSFC members act in awareness of the Board of Regents policies and UW-Madison campus policies interpreting this Wisconsin Statute.

The General Student Services Fund (GSSF), representing a unique division for campus student services, is intended to provide a source of funds for those services which, provide direct, on-going services to significant numbers of UW-Madison students. These funds should also contribute significantly to student health, safety, or academic success. SSFC will allocate funding only if more appropriate funding sources are not available. SSFC expects groups to continually search for other available funding.

Applications to the GSSF are open to all registered student organizations, University Departments or community based services as described in the guidelines. Proposals for the GSSF funding shall be subject to a preliminary screening by SSFC to identify those proposals that appear not to meet the following guidelines. The SSFC chair will alert groups to the result of the preliminary screening to determine which groups wish to continue the application process.

Guidelines

1. The organization must be a registered student organization, University department, or community based service that provides a direct, on-going service to significant numbers of UW-Madison students. These services should also contribute significantly to student health, safety, or academic success.
2. The organization must be non-profit.
3. For programs serving both students and non-students, SSFC will generally consider funding only those portions of the programs that directly serve students.
4. The service generally shall not be one that is presently being funded by the University. GSSF funds are not intended to replace any cuts in student services or programs currently or previously funded through tuition or GPR monies.
5. Salary levels must conform to the University Student Employment Guidelines. Only the maximum allowable salary level can be granted in the event the actual salary is higher. Volunteerism is encouraged by SSFC and positions may also be entirely, or

mainly, volunteer with a minimal salary offered to help offset some of the expenses incurred for volunteering.

6. SSFC does not condone the use of GSSF funding for capital expenditures unless it is determined that the equipment will substantially enhance the service offered to students and that all other avenues of funding have been exhausted. In the event SSFC does fund such an expenditure, the organization is expected to make such equipment reasonably available to other SSFC funded groups. If such organization folds, ownership of said equipment shall revert to SSFC.

7. The organization does not have a *primarily* political orientation (i.e. is not a registered political group) and shall not use SUFAC funds for any lobbying purposes.

8. The organization does not have a *primarily* religious orientation.

9. All expenditures and revenues must be documented and records must be available for public inspection.

10. There must be proof of student clientele and a record system in place for measuring the number of students served.

11 A system must be in place for appropriate evaluation of the organization's services by their clientele in order to determine whether the SSFC funds are most effectively allocated in response to student needs.

12. Organizations which have over 30% of their budget derived from segregated fees, and have a governing/advisory board, shall have at least one full

voting member be an SSFC representative. The SSFC representatives shall be appointed by the SSFC Chair.

After the SSFC public hearing, a decision will be reached and a recommendation made to the ASM Council and forwarded to the Chancellor and the Board of Regents.

UNIVERSITY OF WISCONSIN - MADISON

ALLOCABLE/NON-ALLOCABLE SEGREGATED FEE DISTRIBUTION
1995-96 ANNUAL BUDGET

	Rate per Academic Year	Total
Allocable Segregated Fees:		
Organized Activities	$35.40	
Associated Students of Madison General Student Services Fund		
Child Care Tuition Assistance Program	$9.52	
Wisconsin Union Directorate Lectures Series	$1.65	
WISPIRG	$1.42	
Total Allocable:		**$47.99**
Non-allocable Segregated Fees:		
University Health Services	$158.68	
Wisconsin Union	$91.37	
Audit Liability	$16.40	
Total Non-allocable:		**$266.45**

Allocable/Non-allocable Fees: (fees which support both allocable and non-allocable components)	
Recreational Sports	$15.56
Total Segregated Fee:	**$330.00**

Note: Separation and definition of segregated fees into precise allocable and non-allocable components is very difficult and has required careful and lengthy discussions within the shared governance process. The UW-Madison definitions issued January 1989 at the request of the Board of Regents are attached. Caution is required when using the simple distribution schedule shown above.

(96allnon.wk4; 3/24/95; lsd)
(section 4.6/attachment 4)

Definition of Allocable and Non-allocable Components of the Segregated Fee January 1989

Separating segregated fee support into precisely defined allocable and non-allocable components as described in UW System Policy and Procedure Paper #37 is very difficult. Although we have designated the following portions of the segregated fee as allocable and non-allocable. UW-Madison intends to continue its policy of seeking review and recommendations from the Segregated University Fees Allocation Committee (SUFAC) on all budgets supported in whole or in part by segregated fees.

I. *Allocable Designation*-In accordance with UW System Financial Policy and Procedure Paper #37, the allocable portions of the segregated fee are defined as follows:

A. Fee support of the Wisconsin Student Association.

B. Fee support of the General Student Services Fund.

C. Fee support of the third year of intramurals and club sports within the Recreational Sports General Programs three-year budget.

D. Fee support of the Wisconsin Union Directorate lectures program.

II. *Non-allocable Designation*-In accordance with UW System Financial Policy and Procedure Paper #37, the non-allocable portion of the segregated fee supports the following budget items:

A. Debt service.

B. Regent approved capital projects.

C. Operational building ready-for-use expense for all SUF-supported facilities. The base operating funding (non-programmatic) of the Wisconsin Union and Recreational Sports General Programs are non-allocable.

D. An allocation to assure the continued operation of SUF-supported functions in the event of a strike, disaster, etc.

E. Student health services at a level determined by the Chancellor. The Chancellor defines the current (1988-89) level of health services provided by University Health Service as the minimum level of health services at the University of Wisconsin-Madison.

F. The first and second year of intramurals and club sports within the Recreational Sports General Programs three-year budget.

The University of Wisconsin System

FINANCIAL POLICY AND PROCEDURE PAPER
No: 20-Rev (3)
Date Issued: June 8, 1987

Subject: "Guidelines For Expenditures From Student Segregated University Fees and Campus Activity Receipts"

I. *BACKGROUND*

A portion of the total fees assessed each student of the University of Wisconsin System is designated for the operation of various student services and organizations. Those designated fees are called Segregated University Fees (SUF). The Board of Regents of the University of Wisconsin System is granted authority to assess and regulate the use of SUF by Sections 36.09(3), 36.09(5) and 36.27(1) Wisconsin Statutes. The Board of Regents annually approves the SUF expenditure budgets proposed by the Institution Segregated University Fee Allocations Committees (SUFAC), the Chancellors and the President of the System. The total SUF budget of each Institution is divided into a portion allocatable to student program operations and a non-allocatable portion for retirement of debt service, capital projects, building maintenance, the minimum health care module, and other costs in accordance with the provisions of FPPP #37. SUF revenues are deposited to and expended from the Auxiliary Enterprises appropriation (UW Fund 128) in accordance with Section 20.285(1)(h) Wisconsin Statutes.

Section 36.09(3) Wisconsin Statutes outlines the responsibility of the Chancellor with respect to allocated funds "... administering associated auxiliary services; and

administering all funds, from whatever source, allocated, generated or intended for use of their institutions." Section 36.095(5) Wisconsin Statutes provides "Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities."

II. *POLICY*

Only student organizations which meet the institutional qualifications for official recognition and are so recognized and University departments may receive SUF support. All student organizations receiving SUF support along with any student organization using University facilities, must agree as a condition of such support or use, to provide financial records, if requested, indicating specific revenues and expenditures for the particular event for which they received SUF support or the particular event they utilized a University facility. If SUF is received for ongoing operations of an organization, the organization must provide financial records of their entire operation, if requested by the SUFAC or the Institution. An organization's failure to comply with a request for financial information may result in the denial of SUF support and/or use of University facilities.

All SUF money must be deposited and maintained in the State Treasury. For all SUF funded events, organizations must initially use revenues to reimburse the SUF account. Any other revenues are available to the organization for their own use; the organization is not required to keep these excess revenues in the State Treasury. An organization using University facilities for an event for which no SUF support was received is not required to deposit those receipts in the State Treasury.

Organizations may use Institution agency accounts, if available, for the deposit of their activity receipts. These are the minimum deposit guidelines for segregated fees, SUF-related receipts, and receipts generated using University facilities. Institutions may set more strict guidelines for such receipts where appropriate.

SUF money may only be expended for those items and activities which are related to the mission of the Institution and to the purpose of the organization. Expenditures of SUF must conform with existing Wisconsin Statutes, Attorney General's opinions, Board of Regents' regulations, UW System Policy Papers, and State Department of Administration and Department of Employment Relations regulations.

As appropriate, all students must have the opportunity to join any SUF funded organization. Membership must be open to all eligible or qualified students. Exceptions must be approved in advance by the SUFAC and the Chancellor or his/her designee.

The allocatable portion of the SUF budget must be approved by the SUFAC and Chancellor or his/her designee. Student Organizations requesting SUF support must make their financial records available to the SUFAC (meaning the process adopted by students at the Institution for determining segregated fee allocations).

III. *GUIDELINES*

These guidelines are intended to assist students and administrators in evaluating the propriety of expenditures from SUF funds. The following division of expenditures indicate those considered appropriate and those considered inappropriate.

A. APPROPRIATE SUF EXPENDITURES

1. Travel expenses (including admission and registration fees) incurred by UW staff or students to participate in events such as:

   a. Attendance at educational, cultural, social, recreational, or University athletic events.

   b. Recruiting students for musical groups, theatrical groups, publication writers, etc.

   c. Representing the Institution or the student group in the operation and fulfillment of the mission of the student organizations, student service operations, and student government. (These activities are subject to approval by the Chancellor or his/her designee.)

   d. Recruiting athletes, as allowed by conference or membership affiliation.

   e. Busing students within the campus. Payment for bus services which extend beyond the campus boundaries must be approved by the Chancellor.

   All travel expenses must be in accordance with UW System Travel Regulations and guidelines established by the Department of Employment Relations.

2. Expenses Related to Educational, Cultural, Social, and Recreational Activities For:

   a. Personal or professional services (e.g., concert performers, bands, officials, lecturers, and other performers).

Reimbursement for services provided by UW faculty or staff may be made in accordance with the provisions of FPPP #31 and Academic Planning Statement #4.

b. Meals, receptions, and transportation incurred by UW faculty or staff or students while performing a host function for a guest speaker, performer, etc., brought to the campus for a SUF funded activity, if such expense was part of the budget approved for the activity.

c. Production of the event (e.g., films, advertising, promotion, printing, facilities rental, ushers, and security guards). On-campus facilities (buildings and grounds) must be used whenever possible. Exceptions require the prior approval of the Chancellor or his/her designee.

d. Trophies, medallions and other types of awards for student competitive functions, scholastic excellence, or outstanding school/community service, and funding of honor banquets or receptions subject to the following guidelines:

   1) If the organization holding the banquet or reception or presenting the awards receives any SUF support, the Institution SUFAC must specifically approve the expenditure as part of the SUF budget prior to the event.

   2) Cash or product awards in excess of $100 but less than $500 may be given

only upon prior approval of the Chancellor. Those in excess of $500 must be approved by the Vice President for Business and Finance.

3. Student Media Expenditures For:

   a. Publishing student newspapers, yearbooks, magazines, paid admission event programs, and other print media. (Student publications are exempt from the state printing regulations per Section 35.012 Wisconsin Statutes. However, they are not exempt from the regular purchasing regulations in Section 16.70.)

   b. Operating student radio and television facilities.

   c. Student film and videotape productions.

4. Officially Recognized Athletic Program Expenditures For:

   a. Uniforms, athletic equipment, and personal services.

   b. Athlete's housing and meals prior to opening of a semester or during vacation periods.

   c. Grant-in-aid as allowed by conference or membership affiliation.

   d. Medical expenses for an athletic injury incurred while participating in an officially recognized athletic event. Injuries related to intramurals, open gym periods, club sports, and student sponsored athletic events are

not covered. (Information on student health insurance is available from the Institution's Risk Management Office.)

e. Athletic banquets or receptions and awards subject to the following provisions:

1) If the organization holding the banquet or reception or presenting the awards receives SUF support, the Institution SUFAC must specifically approve the expenditure as part of the SUF budget prior to the event.

2) Cash or product awards in excess of $100 but less than $500 may be given only upon prior approval of the Chancellor. Those in excess of $500 must be approved by the Vice President for Business and Finance.

5. Expenditures Relating to the Operations and Activities of: Student Organizations, Student Health Services, Day Care Centers, Union Student Center, Textbook Rental, Parking Utility, Stadium-Arena, Intramurals, and other student services for:

a. Salaries for students and other staff where related to the activity and in accordance with existing institutional and state wage rates and employment procedures. (Payments shall be made in accordance with the provisions of FPPP #31.).

b. Professional services.

c. Facilities, equipment, personal services, and supplies.

d. Organization membership fees in other related and non-profit organizations.

e. Debt service reduction.

6. Promotional items such as matchbooks, key rings, pencils, etc., used to promote an organization's single event or services, provided they are approved through the SUF allocation process.

7. Special and ceremonial campus activities in which students are primarily involved provided they are approved through the SUF allocation process.

B. INAPPROPRIATE SUF EXPENDITURES

1. Direct financial aid to an enrolled student; such as, scholarships, tuition, room and board, etc. This does not apply to child care payments.

2. Gifts, donations and contributions.

3. Awards to UW faculty or staff. Non-monetary de minimis awards are allowable, e.g., certificates, plaques, etc.

4. Costs of legal services. An attorney may be hired in connection with campus legal services, but the Governor's approval is required.

5. Lump sum payments to student organizations (as opposed to payments for specific purposes supported by invoices).

6. Activities which are politically partisan or religious in nature.

C. APPROPRIATE EXPENDITURES OF SUF-RELATED RECEIPTS

1. Receipts generated by SUF activities become part of the budget of that activity and may be used for the purposes described in Section IV.A. On occasions, such as the beginning of an academic year, where a ceremonial activity is merited but SUF-related receipt revenue has not yet been generated, it is permissible to pay the expenses of the activity from SUF and replenish the SUF account when the anticipated receipts are actually generated.

2. Gate receipts from Intercollegiate Athletics may be used for athletic scholarships in accordance with Wisconsin Statutes, University Policies and the official conference rules applicable to the respective Institutions.

3. Donations and scholarships if the activity generating the SUF-related receipts was conducted specifically for such purposes. Any SUF expenses for the activity must be returned to the organization's account from gross receipts. The remaining receipts may then be used for the purpose for which they were generated.

UNIVERSITY OF WISCONSIN MADISON

Excerpt from
Dean of Students Office
Student Organization Handbook 1996-97

Fall 1996

Dear Student Organization Leaders,

As students who lead over 500 organizations at the University each year, you make invaluable contributions to the "second curriculum" (extra-curricular activities) in our community. You and your members plan and produce a wide range of programs such as movies, chess tournaments, nationally known speakers, and folk dancers. Through these events, you make a large and complex University smaller for thousands of students. You also provide opportunities for your members to develop leadership skills.

Student organizations are not just "nice groups to have around" the University. When you get involved in student organizations, everybody benefits in many different ways. For example, last year's Homecoming Committee raised a substantial sum of money for the Dean of Students Crisis Fund. Student organizations have developed, and continue to support, important services for fellow students such as GUTS Tutorial, the Community Law Office, and the Student Tenant Union. You are full partners in the shaping of the community. The University gains or loses directly by the quality of your programs, the skill of your leadership, and the success you have in reaching large numbers of students.

This is a new edition of the handbook. It is road map, so to speak, to guide you on your way to having successful meetings, events and activities. Please familiarize yourself with the policies, rules and regulations under which you will be governed. We welcome your comments about the handbook, and, in addition, the staff in the Student Organization Office, Room 89 Bascom Hall, telephone 263-0365, stand ready to advise you.

I am glad to have this chance to say "thank you" for all that you have done, and will do, for this community through your work with student organizations.

Warm regards,

/s/ Mary K. Rouse
Mary K. Rouse
Dean of Students

Registered Student Organizations UW–Madison 1995-96

Groups Registered as of August 14, 1996: 623

Organization	Descriptor
Acacia	Interfraternity Council Fraternity
Academy of Students of Pharmacy (ASP)	Pharmacy Professional
ACLU-Campus Chapter	Civil Liberty Advocates
Addison	Name Change Organization
Advance	Student Activist/Educators
Advanced Industrialized Countries Group	Politics of AICs
Adventure Learning Programs (ALPs)	Experiential Education
Advertising Club (UW)	Student Professional Group
African Students Association	Social, Educational, Cultural
AHANA (African, Hispanic, Asian, Native Americans)	Minority Pre-Health Professional
AIESEC	International Student Organization
Aikido Club (UW)	Japanese Martial Art

Organization	Descriptor
Allanza Latina (Alliance of Latinos/as)	Latino/a Advancement Org.
Alliance for International Students	International Culture Group
Alpha Chi Omega	Panhellenic Council Society
Alpha Chi Sigma	Professional Co-Ed Chemistry
Alpha Delta Phi	Social Fraternity
Alpha Epsilon Phi	Panhellenic Association Sorority
Alpha Epsilon Pi	Interfraternity Council Fraternity
Alpha Gamma Rho	Social Fraternity
Alpha Kappa Alpha Sorority, Inc.	Black Greek Society
Alpha Kappa Delta	Junior/Senior Honorary
Alpha Phi	Panhellenic Council Sorority
Alpha Phi Alpha Fraternity, Inc.	National Pan-Hellenic Council
Alpha Xi Delta	Panhellenic Council Sorority
Alpha Zeta	Agricultural Honor Society

Organization	Descriptor
Alternative Medicine Club	Alternative Medicine Group
American Indian Science & Engineering Society	Science & Engineering
American Institute of Aeronautics and Astronautics	Air/Space Enthusiasts
American Medical Assn.-Medical Student Section	Medical Student Organization
American Medical Student Assn. (AMSA)	Medical Students Organization
American Nuclear Society (UW-Madison)	Information, Social, Professional
American Society for Engineering Education	Engineering Education
American Society for Information Science	Information
American Society of Ag Engineers (ASAE)	Student Branch
American Society of Civil Engineers	Civil & Environmental Engineering
American Society of Interior Designers	Interior Design Student Chapter
American Society of Landscape Architects	Landscape Architecture

Organization	Descriptor
American Society of Mechanical Engineers	Engineering Student Society
American String Teachers (UW-Madison)	String Music Education
Amnesty International	Human Rights Organization
Art History Grad. Forum	Arts Events Group
Asian American Student Union	Political and Social Action
Asian Christian Fellowship	Christian Fellowship
Asian Pacific Dance Study Group	Asian Pacific Dance
Asian Student Association	Asian Social/Cultural Group
ASM-Diversity Committee	Diversity Committee for ASM
ASM-Finance Committee	Allocates Student Money
ASM-Nominations Board	Search and Screen
ASM-Policy Research and Development	Policy Research and Development
ASM-Shared Governance Committee	Running the University
ASM-Student Judiciary Committee	Judicial Branch of ASM

Organization	Descriptor
ASM-Student Services Finance Committee (SSFC)	Student Government Branch
Assn. of Documentary Filmmaking	Producing/Making Documentaries
Associated Students of Madison (ASM)	UW-Madison Student Government
Association of Hmong Women's Network	Mentoring
Association of Women in Agriculture (AWA)	Women Agriculture Professionals
Atheists and Agnostics of Wisconsin	Freethought Education Forum
Athletes in Action	Christian Sports Ministry
Babcock House	Agricultural Cooperative House
Badger Amateur Radio Society	Amateur Radio Station
Badger Ballroom Dance Team	Ballroom Dance Competition
Badger Crops Club (UW)	Agronomy Academic/Professional
Badger Dairy Club	Dairy Industry Organization
Badger Entrepreneurs Club	Entrepreneurs Information

Organization	Descriptor
Badger Turf and Grounds Club	Turfgrass Management Group
Badger Water Polo Club	Water Polo Club
Badminton Club (UW)	Play Badminton
Baha'l Association	Religious Student Organization
Bahasa Indonesia Students Assn.	Indonesian Language/Culture
Ballroom Dance Association (UW-Madison)	Ballroom Dance Association
Bangladesh Students Association	Bangladesh Cultural Society
Baptist Student Union	Discipleship and Evangelism
Barnard and Chadbourne Hall Assn.	Residence Hall Government
BCC	Role-Playing Gaming Group
Behavioral Science and Law Association	Professional, Social
Belgian Friends	Belgian Students & Staff
Best Buddies	University Volunteer Organization
Beta Alpha Psi	Honorary Accounting Fraternity

Organization	Descriptor
Beta Theta Pi	Social Fraternity
Bi?Shy?Why?	Bisexual Support/Political
Bi-Partisan Advisory Board for Better Leadership	Anti-Political Gridlock
Bible Study Group	Study the Bible
Bicycle Transportation Alliance	Bicycle Advocacy
Black Graduate and Professional Student Org.	Black Social Group
Black Law Students Association	Law/Minority Group
Bohemian Latin American Artists	Artists Promoting Art
Bolivian Student Association	Bolivian Student Association
Bosnian Relief Committee	Political & Relief Organization
Brazilian Students Organization	Brazilian Students Organization
Buddhist Study Group	Practice Buddha's Teaching
Business & Tax Law Association (BATLA)	Business Law Tips
CALS Student Council	Student Government

Organization	Descriptor
Calvary Lutheran Chapel Student Group	Student Religious Organization
Campaign To End The Death Penalty	Anti-Death Penalty Committee
Campus Coalition for Israel	Student Israel Organization
Campus Crusade for Christ (see Student Impact)	
Campus Talk With Ryan Jay	Television Talk Show
Campus Women's Center	Service Organization
Canvas	Undergraduate Literary Magazine
Capitol Velo Club	Women's Bike Racing Club
Capoeira Angola Grupo Mandinga	Brazilian Martial Art
Care Christian Fellowship	Christian Fellowship
Carribean Association of Madison (UW-Madison)	Carribean Student Association
Catholic Graduate Student Group	Education, Social, Worship
Catholic Student Union	Promoting Student Community
Catholic Students of St. Paul	Educational, Social, Worship

Organization	Descriptor
Catholic Students of The Immaculate	Catholic Spirituality/Prayer
Celtic Music Association	Irish Music & Dance
ChEGS	Chemical Eng. Grad. Students
Chess Club (UW)	Chess Activities
Chi Alpha Christian Fellowship	Christians in Action
Chi Epsilon	Civil Engineering Fraternity
Chi Omega	Panhellenic Association Sorority
Chi Phi	Fraternity
Chi Psi	Social Fraternity
Chi-Rho Association	Roman Catholic Activities
Chicano's Graduate Student Organization	Chicano's Graduate Organization
Chinese Independent Union	Mainland China Group
Chinese Language and Culture Club	Chinese Language and Culture
Chinese Student Association (Hong Kong)	Chinese Student Organization
Chinese Students and Scholars Club	Non-Profitable Entertainment

Organization	Descriptor
Chinese Undergraduate Student Association	Undergrad Students from China
Christian Bible Club	Christian Bible Study
Christian Legal Society	Christian Fellowship
Christian Medical Society	Medical Student Fellowship
Christian Science Organization	Weekly Inspirational Discussions
Circle K International	Citywide Volunteer Organization
Civil Rights Defense Coalition	Defend Civil Rights
Clark	Raise Drinking Age
Coalition for Socially Responsible Investment	Company Research
Coalition for Undergraduate Research in Molecular Biology	Molecular Biology Research
College Bowl	Academic Quiz Competition
College Democrats (UW)	Political Organizing Organization
College Libertarians	Promote Individual Rights
College Republicans (UW-Madison)	Campus Republican Organization

Organization	Descriptor
Collegiate Enterprise on Campus	Entrepreneurial/Leadership
Collegiate FFA/AG Education & Extension	Agricultural Leadership
Collegiate Music Educators National Conference	Music Educators Organization
Columbia Support Network	Human Rights Group
Committee For The African Diaspora	Annual Planning Committee
Community Action on Latin America (CALA)	Activism and Solidarity
Community Law Office	(See Legal Information Center)
Companion Animal Club	Companion Animal Medicine
Comparative Literature Student Organization	Graduate Students in Literature
Construction Club	Construction Administration Club
Constructivist IR Group	International Relations Discussion
Consumer Science Student Association	Consumer Affairs Organization
Contours/Lake City Church	Christian Student Group

Organization	Descriptor
Cornerstone Church Students	Christian Fellowship
Council on Family Relations (UW-Madison)	Family Life Issues
Counseling Psychology Student Organization	Graduate Student Organization
Crossroads Ubunta Productions	Innovative Global Education
Curling Club	Intercollegiate Curling Competition
Cutting Edge	Figure/Recreational Skating
Cycling Club (UW)	All Cycling but Motorcycles
Dance Students Association (UW)	Dance Organization
Data Processing Management Assn. (DPMA)	Professional/Social
Debate	Intercollegiate Debate Society
Delta Delta Delta	Panhellenic Association
Delta Gamma	Women's Social Fraternity
Delta Sigma Theta Sorority, Inc.	Black Greek Social Sorority
Delta Tau Delta	Interfraternity Council Fraternity

Organization	Descriptor
Delta Theta Sigma	Interfraternity Council Fraternity
Delta Upsilon	Social Fraternity
Dietetics and Nutrition Club	Interesting, Fun, Healthy
Discourse	Newspaper
Doctors Ought to Care (DOC)	Medical School Organization
Dungeon Masters Association	Fantasy Role-Playing Club
Eagle Claw Kung Fu (UW)	Martial Arts
Eagle Heights Gardens	Gardens for Rent
Eagle Heights/Harvey Street Assembly	EH/HS Resident Representative
EASI	Education/Advocacy/Social
East Timor Action Network/Madison	Fighting Indonesian Occupation
Economics Student Association	Economics Interest Group
Edelweiss Bund	Austrian Cultural/Travel
Education First	Education Is A Right
Elizabeth Waters Hall Association	Residence Hall Association

Organization	Descriptor
Engineers for Environment and Technology	Environmental Engineer Group
Entomology Graduate Student Association	Entomology Activities/Affairs
Environmental Law Society	Law Student Organization
Environmental Toxicology Grad. Student Assn.	Environment Toxicology Research
esCAMEO	Amiga Computer Group
ESCAPE	Social Organization
Eta Sigma Phi	Undergraduate Classics Club
Evans Scholars	Social Fraternity
Family Medicine Interest Group	Medical School Organization
Federalist Society	Law Student Organization
Fellowship of Apostolic Students	Christian Student Organization
Fencing Club	Fencing Club
Filipino American Student Organization	Social & Cultural Organization
Filipino Graduate Student Organization	Filipino Cultural Celebration
Financial Management Association (FMA)	Finance/Professional Group

Organization	Descriptor
Folkdance Unlimited	Recreational International
Food Science Association/Club	Professional Food Science Club
Forestry Club	Forestry Student Org.
Forgotten Realms Revisited	Role-Playing Group
Free Burma Coalition	Political and Social Action
Friends of International Students and Families	International Student Organization
Friends of Metal	Art Metals Group
Friends of NA	Recovering Addicts
Friends of Scott McCormick	County Board Campaign
Friends of the Rape Crises Center	Victim Services/Education
Friends of Spartacus Youth Club	Forum for Marxism
Friends of United Council	Friends of United Council
Friends of University Religious Workers	Religious Organization
Friends of Yiddish Society	Yiddish and Ashkerazic
Future Car	Hybrid Electric Vehicle
Future Elementary Educators	Elementary Educators

Organization	Descriptor
Future Financial Gurus of America	Personal Business Development
Gamma Phi Beta	Panhellenic Council Sorority
German Breakfast Association	German Culture Group
German Dept. Graduate Student Association	German Graduate Group
GLEClub (UW)	Environmental Engineering
Golden Key National Honor Society	Junior/Senior Honorary
Graduate Association of Finance Majors	Graduate Finance Club
Graduate Business Association	Graduate Business Association
Graduate International Business Assn.	International Business Society
Graduate Marketing Network	Graduate Students Marketing
Graduate Students in the Medical School Assn.	Medical Graduate Students
Greater Madison Football Association (GMFA)	Stratomatic Football League
Greater Madison Tuba-Euphonium Society	Performing Ensemble

Organization	Descriptor
Greater University Tutoring Service	University Tutoring Service
Gymnastics Club	Men's/Women's Gymnastics Events
Habitat for Humanity	Volunteer Organization
Hauser for County Board	Student Campaign Organization
Hellenic Student Association	Students of Greek Descent
Highland Bagpipe Association (UW-Madison)	Bagpipe Music Performance
Hillel	Jewish Life on Campus
Hmong American Student Association (HASA)	Hmong Culture
Homecoming Committee (UW)	Organize Homecoming Events
Homeless Support Coalition	Social, Political
Hong Kong Mug Publisher	Hong Kong Student Newspaper
Hong Kong Student Catholic Group	Roman Catholic Student Group
Hoofer Mountaineers	Climbing and Mountaineering
Hoofer Outing Club	Hoofers Outing Club

Organization	Descriptor
Hoofer Sailing Club	Recreational Sailing
Hoofer Ski and Snowboard Club	Education and Leadership
Horticulture Society	Horticulture for Undergrads
Human Factors and Ergonomics Society (UW Chapter)	Industrial Engineering Psychology
Humorology, Inc.	Charitable Musical Production
Hybrid Electric Vehicle	(see Future Car)
Independent Film & Video Collaborative	Film Making and Videography
India Students Association	India Cultural Organization
Indian Law Students Association	Increal Indian Law Visibility
Indonesian Catholics	Indonesian and Catholics
Indonesian Christian Fellowship	Indonesian Students Group
Indonesian Muslim Students Association (IMSA)	Indonesian Muslim Students
Indonesian Students Association	Indonesian Students Organization
Industrial Relations Graduate Students Assn.	Business Association

Organization	Descriptor
Institute of Electrical & Electronics Engineers (IEEE)	Professional Electrical Engineers
Institute of Research of Perspective in Multi-Media	Revalving Arts in Multi-Media
Interfraternity Council	Fraternity Executive Board
International Health Exchange	International Health Interests
International Law Society	International Law Society
International Relations Club	Academic/Professional Interest
International Socialist Organization (ISO)	Political Activist Group
International Student Association	Promotes International Encounters
International Women's Rights Campaign	Political, Social
InterVarsity Christian Fellowship (Undergraduate)	Christian Discipleship Organization
InterVarsity Graduate Christian Fellowship	Graduate Christian Fellowship
Intl. Connections of the Environment	Intl. Environmental Issues
Iranian Students Association	Social/Cultural/International

Organization	Descriptor
Irish-American Student Organization	Irish Culture/Politics
Iron Cross Society	Junior/Senior Honorary
Japanese Christian Fellowship Network (JCFN)-UW	Japanese Christian Fellowship
Japanese Karate Club	Japanese Martial Art
Jewish Coalition	Fight Anti-Semitism
Jewish Greek Council	Promoting Greek Life
Judo Club (UW)	Japanese Grappling/Throwing
Kappa Alpha Theta	Panhellenic Social Society
Kappa Eta Kappa	Electrical Engineering Fraternity
Kappa Kappa Gamma	Panhellenic Association Sorority
Kappa Omicron Nu	Honorary Society
Kappa Psi Pharmaceutical Fraternity	Pharmacy Fraternity
Kappa Sigma	Interfraternity Council Fraternity
Keeping Time Project	Student Film
Keiko	Storm Troopers of Love

Organization	Descriptor
Kendo Club (UW)	Japanese Martial Art of
Khmer Student Association	Academic, Social, Cultural
Kinesiology Club (UW)	Kinesiology Student Organization
KJS3	Political Action
Knights of Columbus Council 6568	Community Service Organization
Korean Agape Fellowship	Christian Fellowship
Korean American Student Association	Cultural Organization
Korean Christian Student Fellowship	Christian Student Fellowship
Korean Student & Scholar Association	Korean Student Support Group
Korean Undergraduate Student Association (KUSA)	Korean Undergraduate Students
Krazy Club	Creative Adventure Experiences
L&S Student Honors Committee	L&S Honors
La Colective Cultural de Aztian	Chicano's Cultural Group
Labor and Employment Law Safety	Law School Organization

Organization	Descriptor
LaFollette Institute Student Association	Student Association
Lao American Organization of Students	Lao American Students
Latino Law Students' Association (LLSA)	Latino Legal Organization
Latter Day Saint Student Assn.	Fellowship, Social, Christian
Legal Information Center	Legal Information & Referral
Lesbian, Gay and Bisexual Campus Center	Education/Outreach/Support
Lesbian, Gay & Bi Catholic Students & Friends	LGB Catholic Group
LGB Graduate Student Group	Social
Linguistics Student Organization	Linguistics Student Organization
Livestock and Meat Evaluation Team (UW)	Judging Team
Lutheran Campus Center	Religious Student Center
Mad Media Science Fiction Fans	Science Fiction Fans
Madison Aids Support Network	AIDS Service Organization

Organization	Descriptor
Madison Arcatao Sister City Project	EL Salvador Solidarity Group
Madison Area Jugglers	Informal Juggling Group
Madison Association of Turkish Students	Turkish Cultural Group
Madison By Night	Live Role-Playing
Madison Campus Ministry	Multi-denominational Christian
Madison Chinese Christian Fellowship	Chinese Christian Fellowship
Madison Community Cooperative	Non-Profit Housing Cooperative
Madison Film Forum	Alternative Film Venue
Madison Homebrewers & Tasters Guild, Ltd.	Home Brewing & Tasting
Madison Hunger Task Force	Against Hunger/Homelessness
Madison Japan Association	Japanese Students Organization
Madison Ki Society	Japanese Martial Arts
Madison Student Radio (WLHA)	Student Radio Station
Madison Treaty Rights Support Group	Native American Issues

Organization	Descriptor
Madison Women's Collegiate Ultimate	Intercollegiate Sport (Frisbee)
Madison Zen Group-Kwan UM School	Korean Zen Buddhism
MADPAC	Public Affairs Group
Maharishi University Group	Meditation Discussion Group
Malaysian Islamic Students Association	Islamic Malaysian Group
Malaysian Students Association	Malaysian Students Association
MEChA	Chicano Student Organization
Med Micro & Immunology Club	Microbiology Interest Group
MEDIC	Medical Community Service
Medical School Class of 1998 (UW)	Medical Class Government
Medical School Class of 1999	Medical School Organization
Medical Student Association	Medical Student Government
Medical Student Volunteer Corps	Domestic Violence Outreach

Organization	Descriptor
Medical Students for Minority Concerns	Medical Student Organization
Medical Students for the Arts	Med. Student Creative Arts
Medical Technology Student Org. (MTSO)	Medical Technology Group
Men's Lacrosse Club	Club Lacrosse Team
Men's Ultimate Frisbee	High-paced Competitive Sport
Mexican Student Association	Support for Mexican Student
Midwest Population Biology Conference Committee	Conference Org./Administration
Mifflin Street Co-op Student Group	Food Cooperative Volunteers
Minorities in Communication	Mass Communication Organization
Minority Students in Ag. & Related Sciences (MANRRS)	Minority Students in Agriculture
Mortar Board, Inc.	Senior Honor Society
Mu Kappa Tau	Honorary Marketing Society
Mujer Latina	Yearly Conference by Latina

Organization	Descriptor
Multi-Cultural Graduate Students in Business	Professional Graduate Students
Multi-Ethnic Business Student Society	Minority Students Business Org.
Multicultural Finance Committee	Cultural Finance Board
Multicultural Mural Committee	Multicultural Visual arts
Multiracial Student Association	Uniting Multiracial Students
Muslim Students Association	Preserve Islamic Identity.
Myriad-Women of Color Organization	Women's Cultural Organization
Na Hoapill O Hawai'l	Hawaii Student Organization
Namalla	National Students of Color
Narodno International Dancers	Performing Folkdance Group
Nation Builders	Christian Political Group
National Agri-Marketing Association (NAMA)	Agricultural Marketing Association
National Lawyers Guild	Progressive Law Students
National Pan-Hellenic Council	Black Greek Council

Organization	Descriptor
National Bridge Chorus	Sing and Get Together
Nigerian Student Union	Cultural, Social
Nonsectorial Bible Study Group	Nonsectorial Bible Group
Nordic Ski Club (UW)	Nordic Ski Club
NTURZOEN	Role-Playing Games
Oak Apple Morris	English Folk Music and Dance
Ogg Hall Association	Residence Life
Omega Psi Phi Fraternity, Inc.	Student/Service Organization
Omulu Capoeira do Istmo	Afro-Brazilian Martial Art/Dance
Order of Omega	Honorary Society
Order of Black Adder	Renaissance Re-enactment
Orthodox Christian Fellowship	Orthodox Christian Group
Pakistan Students Association	Pakistani Cultural Organization
Pais of United Council	Pais of United Council
PAMANA	Cultural/Non-Political
Panhellenic Association	Governing Council for Social

Organization	Descriptor
PEACE	Social Action
Peace Corps. Information Group	International Volunteer Service
Pediatrics Interest Group	Medical Interest Group
Peer Mediators	Conflict Resolution
PEERS	Peer Support & Referral
Performa	Entertainment for Institutions
Permias (see Indonesian Students Assn.)	
Phi Alpha Theta/UW History organization	History Honor Society
Phi Beta Sigma Fraternity, Inc.	Social/Service Fraternity
Phi Chi Theta	Business Organization
Phi Delta Chi (Delta Chapter)	Co-ed Professional Pharmacy
Phi Delta Theta	Interfraternity Council Fraternity
Phi Eta Sigma	Freshman Honor Society
Phi Kappa Phi	National Honor Society
Phi Kappa Sigma	Interfraternity Council Fraternity

Organization	Descriptor
Phi Kappa Tau	Social Fraternity
Phi Lambda Sigma	Pharmacy Leadership Society
Phi Theta	Professional P.T. Students
Phi Upsilon Omicron	The Candle
Pi Beta Phi	Panhellenic Association Sorority
Pi Lambda Phi	Interfraternity Council Fraternity
Pi Sigma Alpha	Poli-Sci Honor Society
Pi Tau Sigma	Mechanical Engineering Honorary
PLATO	Senior Citizen Education
Poetry in Motion	Poetry Mentor Program
Polygon	Engineering Student Council
Power of the People	Preventing Urban Violence
Pre-Law Society (PLS)	Legal Professions Explored
Pre-Medical Health Professions Society	Pre-Health Professions Group
Pre-Optometry Society	Visual Science of Optometry
Pre-School of Pharmacy Club	Social/Interest Group

Organization	Descriptor
Pre-Veterinary Association	Animal Health Interests
Pride Youth	Lesbian/Gay/Bisexual Social Group
Pro-Life Action League	Pro-Life Organization
Progressive Student Network (PSN)	Political/Social Action
Project Video	Video Producer
Public Relations Student Society of America (PRSSA)	Public Relations Organization
Publishing Club	Publishes Things
Pulse Theatre Guild	Independent Theatre Group
Qi-Gong Association of UW-Madison	Mental & Physical Training
Racially Mixed Student Organization	Cultural Awareness Group
Racquetball Team	Competitive Intercollegiate
Radandt for County Board	Political Interest
Rainbow Activists for a Democratic Society	Bring Radical Speakers
Real Estate Club	Real Estate Activities
Recovery Room	Recovery Service Organization

Organization	Descriptor
Recreation and Education Club	Professional Recreation And Fun
Red Ant Theatre	Production/Performance Group
Red Bikes Project	Share-A-Bike Project
Regent Apartments	Private Residence Hall
Retail Club	Retail Interested Students
Rho Chi Society (Eta Chapter)	Pharmacy Honor Society
Rho Mates	Agricultural Interest Group
Rho Mu Sigma	Honorary Society
ROOSAP (Royal Order Of Strange Acting People)	Recreational Discussion Group
Rugby Football Club (UW)	Recreational Club Sport
Running Club (UW)	"Run For Fun"
SAA Student Organization	Archives Grad Students
Saddle & Sirloin Club (UW)	Student Livestock Organization
Scandinavian American Student Assn. (SASA)	Scandinavian Studies Interest
Scandinavian Gammaldans	Folkdancing from Scandinavia
SCAVMA	Veterinary Medical Students

Organization	Descriptor
School of Pharmacy Student Senate	Pharmacy Student Government
Scottish Highland Dancers (UW-Madison)	Competitive Scottish Dancers
Sellery Hall Association	Residence Hall Association
Senior Class	Senior Class Graduation
SF3	Science Fiction Group
SHASTA (Hall Assn. of Slichter, Tripp, Adams)	Student Hall Association
Shelfield	To Free Mumia
Shorin Ryu Karate Club	Okinawan Martial Arts
Sigma Alpha Epsilon	Fraternity
Sigma Alpha Iota	Women in Music
Sigma Alpha Mu	Interfraternity Council of Fraternity
Sigma Chi	Social Fraternity
Sigma Delta Epsilon	Graduate Women in Science
Sigma Delta Tau	Social, Engineering
Sigma Gamma Rho Sorority, Inc,	National Pan-Hellenic Council
Sigma Phi	Social Fraternity

Organization	Descriptor
Sigma Phi Epsilon	Interfraternity Council Fraternity
Simbiota	Neotropical Conservation
SIMPLE (Stds in Media Prod. for Learning & Ed)	Video Production Organization
Singapore Students Association	Internationally Correct
Single Parent Student Group	Family & Political Network
Small Business Association	Entrepreneurship Society
Society for Creative Anachronism	Medieval Recreation Organization
Society of Hispanic Professional Engineers	Latino Engineering Students
Society of Human Resources Management (SHRW)	Junior/Senior Business
Society of Manufacturing Engineers (SME)	SME-Student Chapter
Society of Professional Journalists	Professional Group
Society of the Mace and Crucible	Junior Honor Society
Society of Women Engineers	Multi-Disciplinary Engineering Org.

Organization	Descriptor
Sol Science Club	Academic/Social Group
Soka Gakkai International	Buddhists Group
Songo	Latin American Folklore
Sorry, Shakespeare Players	Comedy Theatre Group
SPIMACAY (UW-Madison Chapter)	Indian Music & Culture
Squash Club (UW)	Recreational Squash League
Stuart's Law Revue Society	Annual Comedy/Musical
Student Art Dialogue	Visual Arts Organization
Student Association of Republic of China	Cultural, Social
Student Bar Association	Law School Governing Body
Student Environmental Action Coalition-SEAC	Student Environmental
Student Faculty Board	Undergraduate Business Org.
Student Hall Organization of Kronshage	Programming Org. of Kronshage
Student Health Committee	Medical Student Organization
Student Impact (Campus Crusade for Christ)	Interdenominational Student

Organization	Descriptor
Student Labor Action Coalition (SLAC)	Political and Social Actions
Student Leadership Program	Student Leadership Organization
Student N.O.W.	Nat'l, Org, for Women
Student Nurses Association	Nursing Student Club
Student Occupational Therapy Assn. (SOTA)	Student Professional Organization
Student Organization of Screenwriters	Developing/Marketing Screenplays
Student Physicians for Social Responsibility	Intl. Cooperation/Local
Student Pugwash (UW)	Science, Society, Ethics
Student Quality Initiative	Audit & Evaluation of University
Student Quality Society of ASOC (SOS)	Professional Quality Organization
Student Solidarity	Socialist-Feminist Organization
Student Vote 1996 Coalition	Voter Registration
Student Wisconsin Education Assn. (UW-Madison)	Pre-professional Teachers

Organization	Descriptor
Students Advocating Valid Education (SAVE)	Freedom from Political Correctness
Students for a Free Tibet	Tibet Support Group
Students for an Independent Quebec	Social, Political, Educational
Students for Camp Heartland	HIV/AIDS Awareness
Students for Chabad	Religious-Educational
Students for Clinton/Gore '96	Political Organization
Students for Dole	Elect Senator Dole to Presidency
Students for Farley	Political Action
Students for Innovative Pharmacy (SIP)	Innovative Pharmacy Exploration
Students for Klug	Political Action Organization
Students for Paul Soglin	Soglin for Congress
Students for Schudson	Political Action Group
Students for State Senator Fred Risser	Political Action Committee
Students for Staude Committee (SFSC)	Student Voice Group

Organization	Descriptor
Students for the New Progressive Party	Political Issues
Students for the Tenant Resources Center	Service Agency
Students for W.O.R.T./Community Radio	Support Student Radio
Students Helping Others (SHO)	Homeless Awareness
Students' Information Technology	Tech. Students, By Students
Students of Education	Organizes Educational Activities
Students of Education for Social Justice	Students Education Democracy
Students of Madison Radio Foundation	Student Radio Support
Students of Objectivism	Philosophy Club
Students Orienting Students	Students Mentoring Students
Students With Children	Email Network, Support
SVM Class of 1997 Club	Social/Fundraising Org.
Swim (UW)	Recreational Swim Group

Organization	Descriptor
SWSHP	Pharmacy Informational Group
Tae Kwon Do Club (UW)	Korean Martial Art
Tai Chi Chuan Club	Chinese Exercise
Taiwan Forum	Taiwanese Public Sphere
Taiwanese American Students Assn.	Cultural Enriching
Taiwanese Student Association	Taiwanese Student Group
Tau Beta Pi	Engineering Honor Society
Tau Kappa Epsilon	Interfraternity Council Fraternity
Teaching Assistants Association	Grad. Student Employee Union
Ten Fat Tigers Society	Cultural/Governmental Society
Ten Percent Society	LGB Social & Cultural
Thai Students Association	Thai Culture
The Buberians	Educational Discussion
The Navigators	Christian Fellowship Group
The Open Face Theatre Collective	Artistic, Multicultural Troupe

Organization	Descriptor
The United	LGB Information Clearinghouse
Theta Chi	Interfraternity Council
Theta Delta Chi	Interfraternity Council Fraternity
Theta Tau	Professional Engineering Fraternity
Tikkum Olam	Jewish Social Action
Tolkien Society	Literary Discussion Group
Triangle	Social Greek Fraternity
Triathlon Team (UW)	Multisport Endurance Activity
Truth in the Middle East	Raising Middle Eastern Awareness
Two-Tyred Wheelmen	Bicycle Racing Club
Undergraduate Philosophy Club	Student Enlightenment
Undergraduate Projects Lab	Independent Programming Lab
Undergraduate Sociology Association	Undergraduate Sociology
Union Puertorriquena	Puerto Rican Student Union

Organization	Descriptor
Unitarian Universalist/Channing Murray	Religious/Social
United Council of UW Student Governments	Student Advocacy & Lobbying
United Residence Hall Board	Residence Hall Board
University of Wisconsin Gospel Choir	Religious Choir
University Pais	Students Helping Children
University Physical Society	Physics Club
University Theatre Artists Association (UTAA)	Undergraduate
USSA-Campus Chapter	National Student Organization
UW Greens	Environmental & Social Justice
UW Russian Folk Orchestra	Folk Music Ensemble
UW Transportation Society (UWITS)	Transportation Engineering Org.
Veritas Forum	Lecture/Seminar Series
Vietnamese Student Organization	Vietnamese Student Organization

Organization	Descriptor
Wargaming Club of the UW	Board & Miniatures Gaming
Waveland	Recall Joe Handrick
Way Off Broadway	Multicultural Performance Group
Wildlife Ecology Club	Social/Educational Departmental
Wildlife Exotic and Zoo Animal Welfare Club	Exotic Animal Welfare
Wisconsin Alumni Student Board (WASB)	Service & University Promotion
Wisconsin Badger Yearbook, Inc.	UW Yearbook
Wisconsin Black Engineering Student Society (WBESS)	Engineering Support Society
Wisconsin Black Student Union	Cultural/Social/Political
Wisconsin Christian Student Fellowship	Christian Student Ministry
Wisconsin Coordinating Council on Nicaragua	Coordinates Educational
Wisconsin Educators for Social Responsibility	Socially Just Education

Organization	Descriptor
Wisconsin Future Alumni Association	Career Related/Networks
Wisconsin Lutheran Chapel Student Group	Church/Student Center
Wisconsin Org. of Responsible Drinkers	Alcohol Awareness Group
Wisconsin Public Interest Law Foundation	Public Interest Law
Wisconsin Student Black Liberation Society	Black Liberation and
Wisconsin Student Planning Association	Planning Student Organization
Wisconsin Students for Powell	Colin Powell Campaign
Wisconsin Women's Law Journal	Women's Legal Scholarship
WISPIRG-Action for Accountability	Legislative Watchdog
WISPIRG-Buy Recycled	Close Recycling Loop
WISPIRG-Campus 2000	Environmental Event Planning
WISPIRG-Consumer Protection	Ensure Value and Safety
WISPIRG-Environmental Education	Teach School Children

Organization	Descriptor
WISPIRG-Hunger & Homelessness	Eliminate Hunger & Homelessness
WISPIRG-Mining Reform	Preserve Accessability
WISPIRG-Voter Registration	Registering Student Voters
WISPIRG-Water Watch	Monitor Waterways
WISPIRG-Wis Student Public Int. Research Gr.	Student Political Action
Witte Hall Organization	Residence Hall Group
WLHA	(see Madison Student Radio)
Women In Communications, Inc,	Communications Organization
Women in Medicine	Women Medical Students
Women Law Students Association (WLSA)	Legal Feminist Organization
Women's Club Volleyball	Women's Volleyball
Women's History Community	Women's History Interest Group
Women's Ice Hockey Club	Women's Hockey-All Levels
Women's Lacrosse Club	Women's Lacrosse Club
Women's Professional Network	Graduate Women's Organization

Organization	Descriptor
Women's Water Polo	Women's Water Polo Club
World Coast Productions	Music/Dance
WUD-Alternative Breaks	National Volunteer Organization
WUD-Art	Plan Gallery Exhibits
WUD-Arts and Literature Committee	Poetry, Literature, Performances
WUD-Behind the Beat	Weekly Jazz Program
WUD-Community Services/Family Programs	Issue, Opportunity, Service
WUD-Contemporary Issues Committee	Student Programming
WUD-Cross Cultures	Social Education-Cross Cultures
WUD-Distinguished Lecture Series	Lecture Promotion Committee
WUD-Film	Film Committee
WUD-Memorial Union Music & Entertainment	Bookings & Promotion of Music
WUD-Performing Arts Committee	Music, Dance, Performance
WUD-Travel Committee	Plan Travel Programs

Organization	Descriptor
WUD-Union South Entertainment	Music, Zaniness
WUD-Wisconsin Union Directories	Student Programming Board
Wunk Sheek	Native American Organization
Youth Organization for Us (Y.O.U.)	Political Action
Zeta Psi	Interfraternity Council Fraternity
Zoe Bayliss	Coop for Women

Fund Raising

* * * *

▶ **How Do We Finance Our Activities?**

The primary sources of funding for most student organizations are membership dues and other fund-raising ideas. Some financial assistance for particular programs may also be available through the Associated Students of Madison (student government) or other campus funding sources listed later in this chapter. You may also want to look into seeking sponsorship by a University department, school or college. Sponsoring departments can sometimes provide student groups with help on copying costs, postage, or miscellaneous operating expenses.

If you decide to have membership dues, collect a set amount from each member each semester. Decide as a group what is a reasonable amount. It will help to know how much money you'll need for the year first. Will students pay less than nonstudent members? What if someone can't afford the dues? Be sure to disclose to dues paying members how the dues will be used. Also, establish a policy/plan regarding what happens to money left in the treasury should the group disband.

* * * *

▶ **Ideas for fund-raising events**

Food

- Selling food at community events (usually requires permits)
- Pancake breakfasts
- Luncheons

- Progressive dinners (change locations between courses)
- Ask a restaurant to donate a portion of the profit on a particular day)

Entertainment

- Dance/balls
- Movie nights
- Exhibition contests
- Casino night
- Concerts
- Ski tours/travel packages
- Sports tournament/runs
- Skating parties

Publications (design your own)

- Calendars
- Cookbooks
- Cards
- Notebooks
- Bookmarks
- Newsletters (sell ads)
- Coupon books (like the Bucky Book)

Miscellaneous

- Auctions
- Book fairs
- Car washes
- Rummage/garage sales
- "Thons". . . walk-a-thons, bowl-a-thons, Monopoly-a-thons,
- Rent-a-service (have people donate their skills and expertise)
- Tours (have an "insider" host a tour of their business or profession)
- Membership drives

Information/donation solicitation at community fairs and festivals
Grant writing
Corporate donations (CUNA, Rayovac, Oscar Mayer)

* * * *

▶ Campus Funding Sources

The following are campus funding sources which are typically used by student organizations. Contact a particular funding organization to obtain their guidelines before making application and to inquire if the funds are available.

⊠ Associated Students of Madison (ASM)

Contact: ASM Financial Specialist OR T.J. Richards, ASM Finance Committee Chairperson
Address: ASM Office, 511 Memorial Union, 800 Langdon St.
Telephone: 265-2272 or 265-4276
Email: asm@macc.wisc.edu or alison@macc.wisc.edu

ASM funds events sponsored by Registered Student Organizations. These events must be in the Madison area and open to all University students. Applications requesting $1,400 or less must be received by the Monday at least four weeks prior to the date of the event. Applications requesting more than $1,400 must be received by the Monday at least six weeks prior to the date of the event. Details for applying can be found on the comparison chart at the end of this chapter.

ASM also has three other funds that provide support to student organizations.

Recognizing that student organizations play a significant role in the education of UW-Madison students, ASM has established the *Operations Grant Fund* to support the ongoing organizational needs of student organizations. Printing, postage and office supplies are the major categories of funding. The application deadline is in March for the following year. See comparison chart for additional details.

A small amount of the Operations Grant Fund is set aside for newly formed organizations and organizations that did not apply the previous spring. The *Last Minute Operations Grants* are limited to a maximum of $250. The applications are due on September 26, 1996.

There is also a small *Travel Grant*. The travel being funded must be central to the purpose of the organization. The deadline for this grant is the last day of the month two months prior to travel (e.g., traveling January 4, application due November 31; traveling May 29, application due March 31). The travel fund primarily supports transportation, lodging, and registration fees. These grants cannot fund food, and all expenditures must adhere to University of Wisconsin travel regulations. Typically groups receive about $200. Please call prior to submitting applications to see if any funds are still available.

Applications for ASM funded grants are available at the following locations: ASM, 511 Memorial Union; Interim Multicultural Center (IMCC), 2nd floor, Memorial Union; Campus Assistance Center (CAC),

420 N. Lake Street; Student Organization Office (SOO), 89 Bascom Hall; Union South Program Office, 3rd floor, Union South.

All grant decisions are made by the ASM Finance Committee. The Finance Committee is made up of 9 students; 5 are appointed from among the student body and the remaining 4 are ASM Council representatives. If you are interested in serving a term on the Finance Committee, please contact Christy Wolfe or Katie Smith at 265-4276.

- **Multicultural Council**
  Contact: Susan Colorado, Multicultural Advisor
  Address: Interim Multicultural Center, 2nd Floor, Memorial Union
  Telephone: 265-2873/262-4503

Deadlines: At least 30 to 60 days before the program.

Description: Funds are distributed by the Multicultural Council, a student group comprised of representatives from five ethnic student populations on campus. The intent is to sponsor or cosponsor programs that are of a multicultural nature, of broad interest to the student population and will enhance campus awareness of diversity.

Restrictions: Funds may not be used for the purchase of food, off campus programs, travel related to an academic department or printing costs by non-state facilities. It is expected that organizations also seek financial support from other sources. Request guidelines and strictly adhere to them. Also see the comparison chart at the end of this chapter.

- **Wisconsin Union Directorate (WUD)**
  Contact: Student director of specific committee: Alternative Breaks, Art, Community Services, Contemporary Issues, Cross Cultures, Film, Hoofers, Ideas & Issues, Memorial Union Music & Entertainment, Performing Arts, Travel, and Union South Entertainment. When in doubt, contact the WUD Vice President for Program.
  Address: 507 Memorial Union and 303 Union South,
  Telephone: 262-2214 or 263-2432

Description: The Wisconsin Union Directorate is the student programming board in Memorial Union and Union South. It is not a funding source per se; however, it will cosponsor/cofund programs with Registered Student Organizations and academic departments. Contact the student director of a specific committee. Details and procedures may vary depending on the committee. Each committee will decide if and how they will be involved in program planning and the dollar amount. See WUD committee director for information. Details are on the comparison chart at the end of this chapter.

- **University Lectures Committee**
  Contact: Secretary of the Faculty Office
  Address: 133 Bascom Hall
  Telephone: 262-3956

Send 9 copies of request at least 6 weeks prior to proposed lecture.

Description: Committee accepts requests from (1) departments and (2) officially recognized student

organizations registered with the Student Organization Office when the program is cosponsored by a department. Topics and speakers must be of interest to undergraduate students. Subjects of interest to upper level undergraduates and graduates will be considered. Speakers to be invited should be men and women of distinction. Requests should include detailed information concerning speakers, professional standing and qualifications.

Restrictions: Honorarium of $0, $300, or $600 per day according to University regulations, plus travel up to $1,000. All lectures are open to the public without charge. Committee expects that other sources of funding will be explored before applying to the University Lectures Committee. Committee will not provide funds for speakers who lecture under contract for commercial agencies or who require large fees.

▶ **Off Campus Funding Sources**

A very complete directory of off campus funding sources called *Student Organization Funding Resources Guide* can be reviewed at SOO, the ASM Office (511 Memorial Union), or the Campus Assistance Center (420 N. Lake Street). Most of the funding sources support cultural and artistic programs and include the Humanistic Fund, the Anonymous Fund, Dane County Cultural Affairs Commission, Madison Committee for the Arts Program, Madison Civic Center Foundation and Wisconsin Arts Board. Two other groups, not restricted to cultural and artistic events, are the Evjue Foundation and the UW System Institute on

Race and Ethnicity. The Evjue Foundation is for nonprofit organizations, not for individual projects. UW System Institute on Race and Ethnicity funds projects that deal with ethnic minority issues and directly serve a UW System population (it requires the student organization to have a faculty or academic staff contact person).

⊠ **UW System Institute on Race and Ethnicity**
Contact: Thomas V. Tonnesen
Address: University of Wisconsin-Milwaukee, P.O. Box 413, Milwaukee 53201
Telephone: (414) 229-6701/4700

Deadlines: May vary. Awards are made each fiscal year.

Description: Grants of up to $1,000 are available for a variety of purposes, such as workshops and seminars, honoraria and/or travel expenses for guest speakers, fine arts performances or cultural exhibits, or materials such as film rental. The project/program must focus or deal with ethnic minority issues and directly serve a UW System population.

Faculty, academic staff, students, and student organizations at all UW campuses and centers are eligible to apply. A student organization must have a faculty or academic staff contact person. If your proposal is chosen for funding, the moneys will be transferred to the appropriate campus and departmental account. The Institute encourages you to call its office to discuss your proposal idea before its submission.

ASM OPERATIONS GRANT APPLICATION 1995-96

Militant Student Union of the University of Wisconsin

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

The Militant Student Union works for the empowerment of and against the systematic oppression of women, minorities, and the poor, the tradition of the student left. We do not subscribe to ineffective and unchallenging tactics of most left oriented student groups on campus, and as such, refuse to compromise our beliefs or apologize for them in any way. Neither do we sell out like the Democratic Party. We work for student solidarity and effective, drastic and permanent social change in society and at the UW to alleviate the oppression of women, minorities and the poor. We intend to challenge any institution or organization, right or left, that fails to do so, by engaging in popular political pressure, demonstrations, boycotts and whatever means are necessary. To highlight these inequities we will continue to hold forums, debates and speakers to expose inequality and oppression wherever it hides.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

The MSU has already begun its campaign to challenge groups and individuals about the rights of women, minorities and the poor. We have engaged in public debate with College Republicans, WISPIRG members, the ISO and members of the Jewish political community. We organized a forum on racism in education in which similar debates and dialogue continued. We invited a [illegible] civil right activist to the

UW to comment on his views and experiences ("Higher Miseducation") and even interviewed Minister [illegible] regarding student apathy and published the results at the interview in the Badger Herald opinion section. We intend to keep pressing these issues and increase these tactics, letter campaigns, demonstrations confronting racism, classism and sexism by any means necessary.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

We work with students, student leaders and groups with media outlets and flyers to reach students [illegible].

ASM OPERATIONS GRANT APPLICATION 1995-96

Student Labor Action Coalition

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

The Student Labor Action Coalition is dedicated to educating the student body about issues facing working people. We believe that the concerns of working people are often ignored and downplayed in our society. As future holders of jobs ourselves, we try to raised students' awareness of the changing nature of the workplace and labor-management relations. We try to make direct connections with working people involved in the struggles of the labor movement in order to directly present their perspective to students.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

We have held forums which brought professors, students and labor activists to present their ideas to the student body. We have presented information on labor events at tables in Memorial Union and in the dorms. We have gathered signatures on petitions on issues of concern to students and workers, showed videos of various events involving working people, held demonstrations to raise awareness and raised funds to pursue these goals. We have also traveled to places like Decatur, IL where working people are boldly taking stands for safe work conditions and fair contracts.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

The Student Labor Action Coalition reaches out to the student community through public awareness events. In addition, we have tabled in the Union, held public forums, put on fundraising events, and mobilized students to participate in campus-wide protests. Further, SLAC members and other student have attended labor conferences and visited the sites of labor struggles and brought back information to enrich the above described events.

ASM OPERATIONS GRANT APPLICATION 1995-96

Student Solidarity

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

We want to educate the university community about progressive ideas for social change, and to participate in implementing some of those ideas. We are especially concerned with educating students about the value of a democratically organized labor movement in the contemporary U.S.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

We have held a wide variety of events on topics such as labor law and trade union reform, Bosnia, Chiapas, health care, immigration, and free trade. We have held 2 'day schools' -- day long educational events, which students from around the Midwest have attended. We have brought several prominent speakers and activists to Madison, to provide public forums and a chance for students to meet with the activist. We hold regular study groups on a variety of topics.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

We have general meetings every 2 weeks, study groups every 2 weeks and monthly potlucks -- all of which are open to the public. We have regular public events (see # 2), for which we advertise heavily to let students know about us. We set up information -- lit tables at our events and other campus

events. We have national newsletters and journals and a local newsletter, which we mail to a mailing list.

ASM OPERATIONS GRANT APPLICATION 1995-96

La Colectiva Cultural de Aztlan

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY, AND GOALS?

In 1998, five students created La Colectiva Cultural de Aztlan as a support group for Chicano/a undergraduate students at UW-Madison. Now, we have many active members who are involved in different areas of college life. These areas include culture, politics, recruitment, and social activities. Culturally, we celebrate different events, such as: El 16 de Septiembre, *La Virgen de Guadalupe*, and El Cinco de Mayo. As members of La Colectiva Cultural de Aztlan, we go to conferences to meet with other college students and discuss common problems and plans. Politically, we have to fight for what we want. Because of student pressure, the existing Chicano Studies Program was established in the 1970's. We are still pressing for its expansion into a full, degree-granting department. We also support off-campus political groups, such as Centrao Hispano of Dane County and The United Farmworkers of America. Recruitment-wise, we interact with the local middle and high schools through tutoring, mentoring and campus tours. We also work with the Chicano Studies Program and the Admissions Office regarding the recruitment and retention of Chicano/as and other Latino/as. Socially, we sponsor informal dances, fundraisers and get-togethers.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

In the past we have sponsored dances and other social gatherings. We have also co-sponsored a variety of art exhibits, including the Mexican Revolution Photo Exhibit which is now on display in the Porter Butts gallery of the Memorial Union. We produce a monthly newsletter that highlights poetry, prose and art by and about La Colectiva members. Politically, we have been very involved in campus politics through our involvement with the Minority Coalition and the Latino/a Student Action Committee. We have co-sponsored such speakers as Dolores Huerta and the late Cesar Chavez. Culturally, we have co-sponsored performances by el Teatro Campesino and El Teatro de la Esperanza. We also co-sponsor the Mujer Latina Conference held every Spring on the UW-Madison campus. We are planning big-scale Cinco de Mayo celebrations, as well as various events for Latino History Month in September.

3. **HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?**

Our organization reaches out to the student community of UW - Madison and other Wisconsin system campuses by producing a monthly newsletter, utilizing the campus and local media, and distributing promotional flyers about our organization and the various events we sponsor. We also have an extensive phone/mail list that we use to its fullest potential. Our events are open to every student on the UW - Madison campus.

ASM EVENT GRANT APPLICATION 1995-96

La Colectiva Cultural de Aztlan

TITLE OF EVENT: Hispanics For Wilson: The New Agenda

1. PLEASE DESCRIBE THE EVENT, ITS PURPOSE AND ITS AUDIENCE (in the space below).

Hispanics For Wilson is a satirical look at Proposition 187 and California Governor Pete Wilson's '96 presidential bid. The two members of the group, Lalo Lopez and Esteban Zul, also head up Pocho Productions, which is an L.A. based production company that publishes Pocho Magazine. Their performance will educate the university community on the complexities and consequences of legislation such as Prop. 187 and English Only laws. As well as discussing these issues, Lopez and Zul will talk with the UW-Madison community on the importance of grassroots organizing through the media, and discuss their success with their own grassroots magazine, Pocho Magazine. A visit by HFW will educate the UW-Madison community on the revolutionary spirit and resistant aspects of the Chicano culture and politics. The program is open to all UW-Madison students, faculty and staff with the aim to foster diversity by sharing this aspect of Mexican-American/Chicano culture. The estimated attendance is 350 people.

* * * *

6. HOW WILL THIS EVENT BENEFIT THE MADISON CAMPUS COMMUNITY?

This event will benefit the Madison campus community by fostering both multiculturalism and diversity. By exploring this aspect of Chicano politics, the event will teach the campus community about an important aspect of Chicano

culture. Issues like the English Only laws or Proposition 187 do not only affect Latinos, illegal immigrants, or California residents. These are nation-wide issues and concerns. As university students, staff and faculty, it is imperative that we are aware of these issues and learn the consequences of the legislation at hand. This event would do just that.

ASM OPERATIONS GRANT APPLICATION 1995-96

Madison Treaty Rights Support Group (M.T.R.S.G.)

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

The Madison Treaty Rights Support Group was founded in October 1987, to organize the non-Indian community in support of Native American rights. Our group originally formed in response to the anti-treaty movement in Northern WI. We saw the anti-Indian violence as similar to what is happening to indigenous peoples around the world -- but in our own backyard. Along with other groups in the Midwest Treaty Network, we helped to start the Witness of Nonviolence for the Chippewa spearfishing seasons. Since that time we have branched out to address the protection of lands, cultures and sovereignty for all Native American nations. We continue to function as a link between the Native community in WI. and supportive students in Madison. Our goals are: (1) To increase awareness and understanding of Native American issues (such as mining, religious freedom & harvesting rights) by educating students and the larger Madison community on current issues. (2) To take social and political action on these issues through rallies, vigils, letter writing campaigns, etc.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

In the past we have increased awareness and understanding of Native American issues, through our Native American Resource Library which offers books, videos, and curriculum kits. This summer, we co-organized the Protect the Earth

conference, which brought in speakers from Alaska to Colombia. We put out a regular newsletter and printed out detailed pamphlets and information sheets on current issues. We have brought several speakers to Madison this school year and we have helped organize rallies and press conferences. In the future we hope to maintain regular office hours for our Library, and improve the awareness on campus of this tremendous resource in addition to continuing our educational efforts.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

We have put up a table at the ASM student organization fair, we have advertised on campus for all our events by postering and through email networks, we have even gone to the meetings of other student groups to try to work together on events, and coordinating our goals. We have sent information to American Indian Studies classes on our Native American Resource Library, and we have provided information on our group at tables at the Memorial Union, in addition to making announcements of coming events in several classes.

ASM OPERATIONS GRANT APPLICATION 1995-96

MADPAC

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

Our organization seeks to engage students in political action and provide a forum for discussion based on an interest in Israel and the regional peace process. To accomplish this goal, the organization provides its members with current information and materials and guest speakers. We hope to stimulate a greater awareness and understanding of these issues among the campus community.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

We have organized programs, allowing students to learn and participate. Recent events have included bringing various state and local political candidates to campus and the consulate-general of the Israeli embassy. We have co-sponsored a variety of activities with other campus groups such as the Black Student Council, College Republicans and the political science honor society.

In the future we plan to continue bringing relevant speakers to address the students at Madison. We also intend to organize other activities inviting students both within and outside of the group.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

Through advertising and postering. We try to appeal to a broad audience in the Madison community. We also get involved with other organizations' activities in an effort to bridge relations.

ASM OPERATIONS GRANT APPLICATION 1995-96

Amnesty International

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY, AND GOALS?

Amnesty International is a non-political worldwide movement working on human rights issues. We work on behalf of all "prisoners of conscience"—people who are arbitrarily detained solely because of their belief, color, gender, sexual orientation, language, or religious creed, provided that they have not used nor advocated violence. It works for fair and prompt trials for all political prisoners, and works on behalf of such people detained without charge or trial. It opposes the death penalty and torture or other cruel and inhuman punishment of all prisoners without reservation. This chapter of Amnesty International on the UW campus has been *extremely* active this year. Our goal as a student group to get the students educated, aware, and involved to work towards the reduction of human rights violations in the world. Our activities are always geared towards the students, and none of our profits from our fundraisers are used for personal benefit.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

We hold weekly meetings in which we try to educate ourselves on new cases of human rights violations. Our fundamental campaign is the letter writing Urgent Action in which we receive two actions a week focusing on pressing issues of human rights violations around the world and we

write letters to these countries urging them to respect the human rights of these prisoners. We try to plan events to raise awareness for the student body, and our successes in the past have included bringing a Haitian refugee to campus to talk about the atrocious violations in her country; weekly tutoring of the local Hmong community and trying to coordinate activities for them outside of their community center; host discussion and panels about certain countries including Burma, East Timor and Colombia. We are in the midst of trying to raise money for an orphanage in Zimbabwe, and we are also trying to coordinate activities on the university campus to raise awareness on the death penalty legislation here in Wisconsin. All in all, our approach and purpose is educational, and we try our best to raise awareness about the human rights situation all over the world.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

Amnesty International already has an excellent reputation in the community for its work on addressing human rights violations through the world. Our activities are probably the best approach to reach out to the student community. Along with incessant flyers across campus publicizing our activities, we organize speakers, letter writing campaigns, set up literature tables, write articles in the student newspaper etc. and invite any interested student to attend our functions. We also work closely with other student organizations so that we can have a much wider array of issues and resources we can tap into. We are also considering the possibility of approach professors to see if they can incorporate human rights education in their curriculum.

The Campaign to End the Death Penalty

brings Robert Meeropol
Jennifer Bishop Jones
Delbert Tibbs
Jed Stone
Thursday, Oct. 3, 7:30 p.m.
3650 Humanities Building

Stop the Death Penalty: A Panel Discussion

Robert Meeropol is the son of Ethel and Julius Rosenberg. He and his brother are the only children in the history of the United States to have lost both parents to the death penalty. This politically motivated state murder is a black moment in the history of this country. He is now the director of the Rosenberg Fund for Children.

Jennifer Bishop Jones, whose sister was murdered, is a member of Murder Victims Families Reconciliation.

Delbert Tibbs is a former death row prisoner who was found innocent after several years of waiting to be executed.

Jed Stone is a defense attorney handling appeals for condemned prisoners. Rolando Cruz, wrongfully convicted and sentenced to die, was one of Jed Stone's clients. Mr. Cruz was found innocent after many years on death row.

This panel is being sponsored by The Campaign to End the Death Penalty and co-sponsored by Amnesty International, The International Socialist Organization, The National Lawyers Guild, Plymouth Congregational U.C.C., Rainbow Books, University United Methodist Church, The Wisconsin Coalition Against the Death Penalty, and Wisconsin CURE. For information call Matt at 608-259-0458. Funded in part by the Associated Study of Madison. ASM does not necessarily endorse the beliefs or actions of this organization.

ASM OPERATIONS GRANT APPLICATION 1995-96

Students of National Organization for Women
(Student NOW)

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

Our organization serves the purpose of educating the UW campus about women's rights and gender issues and empowering students with skills and strategies to affect change in our community. We believe that all women regardless of race, class, sexual orientation, physical ability, and ethnicity, should be free from gender discrimination in our society. Our goals are to increase the awareness of students on issues such as violence against women, sexual harassment, wage discrimination, racism and homophobia and provide opportunities to join together to fight these injustices.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

Student N.O.W. formed this semester. We have viewed a video on the depiction of women in rock videos; held a postering campaign on campus displaying brutal statistics of the discrimination of women, and held a table at the Union celebrating International Women's Day (March 8, 1995). We intend to continue these activities as well as presenting movies (about women's issues) to a larger student audience, holding workshops as well as seminars open to all students. We also intend to collaborate with other student organizations such as the Campus Women's Center on Take Back the Night and Women's History Month.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

Student NOW announces all its programs and projects on the RSO Network flyers for weekly meetings and posters for each event are displayed around campus. We hold tables at Memorial Union providing information on Student NOW and gender issues.

ASM OPERATIONS GRANT APPLICATION 1995-96

International Socialist Organization

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY, AND GOALS?

We are an organization based on UW-Madison campus whose primary goals and responsibilities are to educate ourselves and other UW students on issues in world history, politics, economics, and other cultural issues relevant to our understanding of the world and how its systems (political, economic, social, cultural, and environmental) effect our lives.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

We hold weekly public meetings on relevant topics to educate ourselves and other students with a better understanding of the world and its systems. In the past year, we co-sponsored two debates one with *The Badger Herald* on issues of editorial responsibility and free speech and one with The College Republicans on the issue of welfare reform. We have also held recent panels on such issues as labor, Mexico, and Native Americans with other student groups, members of the community, and experts. We regularly contribute editorials and letters to campus and community newspapers to generate discussion on relevant political, social, cultural and environmental topics.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

We poster for all our meetings, which are open to the entire student community and advertise as such, on the UW campus and into the Madison community. We contact students and other student organizations to attend our weekly meetings, as well as to participate in debates and panels. We have regular literature tables, contribute editorials and letters to campus and community papers and advertise our events on local radio stations.

ASM OPERATIONS GRANT APPLICATION 1995-96

Community Action on Latin America (CALA)

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

CALA has been a campus and community organization at UW since the early 1970's. Our group focuses on Latin America - current issues, historical underpinnings, and USA policy towards the region. We are an activist group that meets regularly with our congressional representatives, sponsors educational initiatives on campus, and hosts speakers and cultural events. Our mission is to encourage student and community dialogue and action with regard to Latin American issues.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

This past year we: helped sponsor a forum on Chiapas, Mexico; appeared as guests on WYOU; conducted a talk on El Salvadorian elections led by a returning student/member who traveled to El Salvador; hosted 2 Madison area Latin American Solidarity groups meetings, helped to bring Harry Fouché of Haiti's Tenth Dept. to campus; presented a slide show on agric. in El Salvador; helped bring Ana Carrigan (noted author) to campus; hosted 2 regional area meetings for CISPES (Committee in Solidarity with the People of El Salvador).

This coming spring, we have organized a 7-event lecture series addressing a wide range of Latin American issues. We are also coordinating efforts with the UW Madison Student

Association around the crises in Chiapas, Mexico. Next years events will reflect this past year's and our current activities.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

While our name is "Community" Action on Latin America, our membership (active) is predominantly made up of students. Our office is on campus, and all of our events have been on campus. Our advertising and membership building activities are primarily focused on the student community. Though we do not have specific information on the matter, it's pretty clear that the vast majority of those who attend our meetings and events are UW students.

ORGANIZING THE AMERICAS

LABOR ISSUES IN CENTRAL AND NORTH AMERICA

Low wages in Mexico and Central America have undermined the bargaining power of U.S. workers. Real wages here have declined during the past two decades, as corporations take advantage of cheap labor and government handouts to subsidize the transfer of U.S. jobs to runaway shops in the Third World. Can this trend be reversed? Latin American organizers talk about the common link between their labor struggles and the struggles confronting labor organizers in the United States.

IN UNITY IS STRENGTH

ORGANIZING FOR JUSTICE IN THE NICARAGUAN FREE TRADE ZONE

7:30 p.m. Monday, Oct. 14, 1996
Pres House Lounge, 731 State St.

Pedro Ortega, General Secretary of the Federation of Textile, Clothing, Leather and Shoe Unions will talk about his work to organize the first legally-recognized union in Nicaragua's Free Trade Zone. Oretaga will speak on the Federation's organizing efforts to work for just relations without exploitation in the Zone.

Sponsored by the Wisconsin Coordinating Committee on Nicaragua (WCCN) and Community Action on Latin America (CALA).

LABOR RELATIONS AND FREE TRADE IN GUATEMALA

7:30 pm Tuesday, October 22
Memorial Union, 800 Langdon Street

Rodolfo Robles of the International Food Workers Union (IUF) refused a $60,000 bribe, defied death threats, and lead a protracted strike and 14-month plant occupation in order to establish a union at the Coca-Cola plant in Guatemala City. The union's victory proved a catalyst for a reborn labor movement.

Sponsored by Community Action on Latin America

ISSUES OF LABOR STRUGGLE IN EL SALVADOR

7:30 pm November 15 (tentative)
The Pres House (tentative)

Speakers will include:

- Eugenio Chicas, FMLN legislative deputy on the Labor Commission of El Salvador's Legislative Assembly.
- Ana Maria Romero, member of the Organizing Commission of the GABO Union, a local of the Union of Textile Industry Workers.
- Wilmer Erroa Argueta of the Salvadoran Association of Telecommunications Workers.

Sponsored by Community Action on Latin America and the Madison Arcatao Sister City Project.

ASM EVENT GRANT APPLICATION 1995-96

WUD ART/WUD CONTEMPORARY ISSUES

TITLE OF EVENT: Wake Up Little Susie / Warnings

1. PLEASE DESCRIBE THE EVENT, ITS PURPOSE AND ITS AUDIENCE (in the space below).

This three-dimensional, mixed media installation by artists Cathleen Meadows, Kay Obering and Kathy Hutton is based on the writings of historian Rickie Solinger. It deals with the struggles of unwed mothers, in the post World War II ear, between 1945 and 1965. They are depicted using pieces on a life-sized chess board representing key players in the issue including doctors, adoption agents, and the unwed mothers both black and white. In particular, the work explains the differences between the way white and black unwed mothers were treated by their families and societal institutions. The exhibit has toured nationally to over a dozen galleries in the past three years and has been well received wherever it has been displayed. In addition, the *Wake Up Little Susie* exhibit there will be a smaller companion exhibit, *Warnings*, by artist Lisa Link, that deals with the propaganda techniques used by the anti-choice movement. There will be a panel discussion, with pro-life and pro-choice representation, on the history of abortion, including a critique of the exhibition.

*Additional information on the exhibits is included in this application.

* * * *

6. HOW WILL THIS EVENT BENEFIT THE MADISON CAMPUS COMMUNITY?

This proposed exhibit is an excellent opportunity for students and faculty to learn about issues in U.S. history that were so often covered up. By working in conjunction with the Women's Studies and History Departments we will be able to generate excellent publicity throughout the campus community. As seen through the letters of support, these departments are very excited about his exhibit. It should offer plenty of opportunity for discussion, questioning, and debate.

CAMPUS WOMEN'S CENTER

710 University Avenue, Suite 202 • Madison, WI 53715 •
(608) 262-8093 • 262-5731

August 28, 1995

To Whom It May Concern:

The Campus Women's Center is happy to co-sponsor the upcoming art exhibit "Wake Up Little Susie: Pregnancy and Power Before Roe v. Wade." The proposed exhibit addresses issues that will be educational and interesting not only to women on this campus, but all students and faculty members.

If there are any questions in regard to our support of this exhibit, please call me at 262-8093 or contact me through e-mail at rswanson@students.wisc.edu.

Sincerely,

Rebecca L. Swanson
Outreach Coordinator

UNIVERSITY OF WISCONSIN-MADISON
College of Letters and Science

Department of History
3211 Humanities Building
455 North Park Street
Madison Wisconsin 53706-1483

Phone: (608) 263-4800
Fax: (608) 263-5302

May 19, 1995

To Whom It May Concern:

As Co-Director of the Women's History Program, I am pleased to support the Wisconsin Union Directorate Art Committee's application for funding to bring the media installation "Wake Up Little Susie" to campus.

This exhibit addresses questions of enormous personal and political importance to both men and women in our present world, and of particular significance in the history of women everywhere. Its presence on campus will be of particular interest to students working in the areas of women's history and women's studies.

Please feel free to contact me if I may be of additional assistance.

Sincerely,

Jeanne Boydston
Co-Director, Women's Health Program

UNIVERSITY OF WISCONSIN-MADISON
Women's Studies Research Center
209 North Brooks Street
Madison, WI 53715
(608) 263-2053
FAX: (608) 265-2409

May 19, 1995

Ms. Marcia Cristall
Arts Director
507 Memorial Union
CAMPUS

Dear Ms. Cristall:

Thank you for contacting us about the possibility of working with you on the art exhibit, "Wake Up Little Susie: Pregnancy and Power Before Roe v. Wade." The Women's Studies Research Center is happy to cosponsor the event with you and to provide help in publicizing the exhibit next Fall (mid-November to mid-December).

We feel that this exhibit will find a large and appreciative audience in the Women's Studies community of faculty, staff, and students, as well as the Madison community that generally supports Women's Studies activities.

Please keep us informed about the details of the event and advise us about any help we can provide.

Sincerely,

Dale M. Bauer
Director

L & S
COLLEGE OF LETTERS & SCIENCE

June 7, 1995

Ms. Marcia Cristall
Art Director
Wisconsin Union Directorate
800 Langdon Street

Dear Ms. Cristall:

I am pleased to report that the Anonymous Fund Committee has approved a grant of up to $500 to the Wisconsin Union Directorate for the Wisconsin Union Directorate Art Committee's cost in planning *Wake Up Little Susie: Pregnancy and Power Before Roe v. Wade*. We request that the Anonymous Fund be acknowledged as a funding source for any publicity.

The Committee has asked me to advise you that all allocated funds not expended by the end of the 1995-96 fiscal year will revert back to Committee control, unless you have requested and received approval to carry the grant (or balance) forward into the 1996-97.

The Committee is happy to provide this support.

Sincerely,

Phillip R. Certain
Dean

xc David Konsak

Wake Up Little Susie: Pregnancy and Power Before Roe v. Wade

Wake Up Little Susie is a three-dimensional, mixed-media installation that explore the theme of pregnancy and race in postwar, pre-*Roe v. Wade* America. The artists, **Cathleen Meadows, Kay Obering** and **Kathy Hutton**, use the chess game and adaptions of chess pieces to represent the positions occupied by unwed mothers, other unhappily pregnant women, and those who responded to these women in the decades just before the legislation of abortion.

The installation is based on **Wake Up Little Susie: Single Pregnancy and Race Before Roe v. Wade** (1992) and **The Abortionist: A Woman Against the Law** (1994) by historian, Rickie Solinger. **Wake Up Little Susie** is an award-winning study of single pregnancy, race, and the politics of female fertility in the United State in the mid-20th century. The book won the Lerner-Scott Prize of the Organization of American Historians, the Emily Toth Award from the American Popular Culture Association, and was named a "Notable Book of 1992" by the *New York Times*.

In the post World War II era, 1945-1965, unwed mothers, both black and white, were defined as deviants threatening to the social order. But white girls and black girls were treated very differently by their families, by social agencies and their communities, and by the government. A white single mother was often diagnosed as psychologically disturbed, banished from her family and community, and placed in a maternity home where she could be hidden. The "experts" told her she had to give her baby up for adoption, or her life — and her baby's — would be ruined.

A black single mother most typically stayed within her family and community and kept her child to raise herself, often with the help of her family. But while politicians and policy-

makers went to extreme lengths to portray this mother as sexually and maternally irresponsible, only interested in having babies in order to increase her welfare check. They routinely promoted policies that made it difficult for black unwed mothers to get housing, public assistance, education and jobs.

The installation also illustrates the way in which state anti-abortion statutes created arenas of extreme danger for women determined to decide whether and when to become mothers, and for those who wanted to help them.

Wake Up Little Susie puts these experiences into social and political context. It suggests that politicians, the popular media, social service professionals, and the public at large incorporated girls and women into the political arena and assigned them political value by race. It shows how women's bodies and their reproductive capacity have been used to promote political agendas hostile to female autonomy and racial equality.

In 1992-93, "Susie" was shown at six college and university galleries in the Rocky Mountain region. Since the Fall of 1993, the national tour has taken "Susie" to No. Arizona St. Univ. (Flagstaff), Pomona College (CA), and the Evergreen St. College (WA), Mills College (CA), the University of OR, & San Jose St. Univ. It will travel to the Universities of NM, TX, CO, MN and other venues. The exhibition has been received and reviewed positively on all campuses as providing a dramatic, beautiful, and historically grounded illumination of the past.

"Wake Up Little Susie" is supported by the Rocky Mountain Women's Institute, Colorado NARAL, the Colorado Coalition for Choice, NOW, NEA-Warhol F'dation-Rockefeller F'dation, The University of Colorado President's Fund for the Humanities, and additional donors.

Grid of Choice

The abortion debate as art

COLLABORATIVE installations with political themes often belong to the "nice idea, but . . . " category, driven by collective dedication to a message rather than individual expression and aesthetics. Our response to them depends largely upon the degree of sympathy or support we have for the position espoused—so a review becomes a bit of agitprop itself.

Wake Up Little Susie: Pregnancy and Power Before Roe v. Wade, based on historian Rickie Solinger's book of the same name, doesn't merely preach to the converted, those pro-choice advocates among us. It's a rare bit of themed art that succeeds on a lot of levels, not the least of which is humanizing the debate surrounding women's reproductive health care by serving up a slice of the realty of life before a recognized right to an abortion existed.

Artists Kathy Hutton, Cathleen Meadows and Kay Obering have used what could have been a trite metaphor for the relative social positions of black and white single mothers and those who exploited, helped or judged them during the era before abortion was legalized in the United States—a giant chess board. But the chess pieces and accompanying collages go beyond making merely obvious statements about the gender-, race- and class-based discrimination involved in the complicated minuet around the law. At its most powerful, the installation reenacts the cultural and psychological fronts of the battle waged against women taking charge of their lives.

Most of the chess pieces are formed of coiled chicken-wire cylinders embellished with found objects from that era. The white pieces stand for socially sanctioned positions and institutions; the black, those outside the bounds of

respectability and recognized power. For example, the white castle pieces are a courthouse and a maternity home; the black castles, an abortionist's office and "Black-town," the politicians' sensationalized specter of breeding gone amuck in the ghetto.

Appropriately, the pawns are those most directly involved, the unwed mothers, aborted women, the white abortionist and the black "voodoo midwife." Both pieces representing the aborted women incorporate 1940s- or '50s-era alarm clocks hooked up to the explosives, rusty, corkscrewed metal, wire clothes hangers and the like. The wooden cross borne by the black woman's figure is shrouded in a public mourning veil; her white sister's is collaged with scraps of news stories telegraphing a less sympathetic public response.

The real-life quotes incorporated into the collages accompanying these pieces underscore the divergent experiences of black and white women in such circumstances: whereas a white woman with money had more illegal avenues open to her than did a black woman, who often was refused abortion services on the basis of her race, an unmarried white woman who became pregnant was more likely to be isolated or shunned, while her African American counterpart generally found more tolerance and support within the black community.

The historical text—the beautifully lettered quotes, enlarged newspaper clippings, book excerpts—included in the accomplished collages are key to *Wake Up Little Susie's* ability to contrast mere rhetoric with the voice of painful experience. Although not without its occasionally heavy-handed moments, the installation doesn't really permit a simple, knee-jerk response but requires the viewer to navigate

the deeper, colder currents of truth all too easily glossed over in typical political debate.

THE ACCOMPANYING exhibit of computer-montage posters by Lisa Link, *Warnings,* is the work of a Jewish feminist enraged by anti-choice propaganda equating abortion with the Holocaust and abortion-rights activists with Nazis. As her own corrective, Link embarked upon two years of research and dug up Third Reich pamphlets, posters, speeches and writings that she graphically juxtaposes with modern-day expressions of the conservative, anti-choice persuasion.

The comparison of Randall Terry of Operation Rescue with Adolf Hitler or Joseph Goebbels may offend some, but the parallels in their messages are hard to refute. And the show is not without touches of humor–the mock Western movie poster portraying Supreme Court Justices Rehnquist and O'Connor as gunslingers shooting down reproductive rights is hilarious. Link's work is viscerally effective and direct, in the tradition of political poster art, taking no prisoners and mincing no words.

ANN ELLIOTT SHERMAN

WISPIRG

Wisconsin Student Public Interest Research Group
(WISPIRG)

SSFC Report/GSSF Funding Application FY'96

Introduction Comments:

WISPIRG is similar to other GSSF groups; but, the organization has a unique history at UW Madison, and a unique relationship with the SSFC. In an effort to clarify our budget and include expense descriptions there are separate budget forms added; and, in order to clearly answer all of the questions on pages 6 and 7 of the application some questions were grouped as a whole section.

Organizational Profile:

1) *History*- PIRGs have been established by students around the country in an effort to pool resources to impact environmental, consumer, democracy, and hunger and homelessness issues. PIRGs are active in more than 20 states with 100 campus chapters nationwide.

At each campus, students vote to assess themselves a minimal fee which then goes to fund programs and professional staff than can help students work on the issues about which they are concerned at the state and national level. The model has proved quite successful, since the PIRGs have passed more citizen initiatives, won more clear water law suits against water polluters, and passed more consumer protection laws at the state and national levels than any other group in the country. Through internship programs, volunteer trainings, professional staff and hard work, the PIRGs give students the leadership skills, issue knowledge, and hands-on experience necessary to become effective advocates on issues.

At UW Madison students attempted to establish a WISPIRG chapter in 1981 with massive student and faculty support. More than 16,000 students and 100 faculty signed a petition encouraging the establishment of WISPIRG. A student referendum was passed in favor of funding WISPIRG with a $2.50 per semester refundable fee. However the Chancellor at that time, Irving Shain, vetoed the referendum results over the protests of students. The Chancellor and the system administration recommended that instead of a separate fee, WISPIRG be funded through the SUFAC process. In the 1989-90 fiscal year students decided to pursue this option and apply for SUFAC funding. Since that time the WISPIRG Madison Chapter has received SUFAC funding in the form of student fees to be payed to the Wisconsin Student Public Interest Research Group, Inc. WISPIRG, Inc. is the state organization of which Madison is a member through the payment of the student fees.

2) *Planning*- WISPIRG is run by a five member student Board of Directors. These students are elected for one year by students at full chapter meetings. The Board of Director pulls together ideas and concerns from other UW Madison students, WISPIRG interns and volunteers, and professional staff when voting on organizational decisions which include: the budget, campaign focus, issue areas, service work, and others. The current Board of Directors are:

Robin Hubbard - Chair
Jessica Dart - Vice-Chair
Lisa Fonseca - Treasurer
Esther Miller - Secretary
Annie Davini - Member at Large

3) *Hiring Policy*- WISPIRG has an affirmative action hiring policy and does not discriminate in hiring or the services we provide on the basis of race, religion, sex, sexual

orientation, physical disability, marital status, amount or source of income, national origin, political ideology or age. WISPIRG hired two employees in the previous fiscal year. University students familiar with our program have traditionally been the first to seek jobs with WISPIRG.

Program Purpose, Problem, Solution, and Outcome

Students have traditionally faced difficulty in their efforts to impact the issues about which they are concerned. Student transience contributes the most to this challenge, because just as students begin to learn the ropes of organizing around issues, they jump into finals, leave for summer break, or graduate. Each semester they must reinvent the wheel. This transience also limits the local, state and national impact of student organizing efforts. Even though students are a large constituency, they are often ignored because of a lack of organization.

More and more students are looking for educational experiences outside of the classroom—ways in which they can impact the problems of our society and develop hands-on skills which they can take into future careers. Students are concerned about the state of our environment in the United States and around the world. They want a more democratic society where special interest influence is not as important as citizen input. And they want a world in which consumers are protected from unfair or negligent business practices and rampant hunger and homelessness do not exist.

Through our internship and volunteer programs, and the experience and expertise of the professional staff, WISPIRG provides students with the educational and action-oriented opportunities that they need in order to receive a well-rounded education, get hands-on real world experience, and effectively impact the issues that matter to them.

WISPIRG works closely with other organizations that address similar problems, such as the various departments which sponsor internships, UW Greens and SEAC which focus on environmental issues, as ASM, United Council, and USSA which help students with issues at the state and national level. Working with the academic departments and the faculty, WISPIRG arranges directed studies internships for students. On a daily basis WISPIRG interns work with other interns and the professional staff and consult with faculty members periodically for advice and academic direction.

With the other campus environmental groups, WISPIRG frequently shares resources in order to improve the effectiveness of student organizing. Earth Day 1994, for example, was successful because each of the groups helped to organize different components of the event as part of a coalition effort.

Even though ASM is relatively new, WISPIRG has worked with ASM, WSA, United Council, and USSA over the years to promote student rights. For example, joint voter registration and education efforts have been key to building student power in the state and around the country. WISPIRG compliments student government by providing students with the opportunity to gain valuable organizing and leadership skills and develop their knowledge on a variety of issues.

Other community groups work on the environmental, consumer, and homeless issues, and WISPIRG provides an important link between students who want to volunteer and the community groups themselves. WISPIRG identifies specific needs in the community in order to effectively channel student energy.

During the past year WISPIRG has easily served more than 20,000 people, 75% of which are students and the rest

community members. More than 1500 students were directly involved with volunteer and internship programs, receiving course credit, coming to our meetings, and actively volunteering. More than 10,000 students have attended WISPIRG-sponsored events: Earth Day, Hunger and Homelessness Awareness Week, Benefit Concerts, Environmental Programs in the dorms, and a variety of others. At least 5,000 students have utilized our educational materials on environmental and consumer issues such as a brochure on conserving energy. Over 5,000 community members have been served by extensive food drives, volunteer work in shelters and parks, and environmental and hunger programs in local elementary and high schools.

While it is difficult to cite the exact number of people WISPIRG serves as a whole, because of possible overlap and indirect impact questions, these figures are low estimates. The extensive public education and advocacy work WISPIRG does affect many more people than the raw figures suggest.

While we always look for ways to improve, WISPIRG interns and volunteers are among the most diligent and effective in informing students about our services. At the beginning of each semester class announcements are made to well over 10,000 students to invite their participation in the internship program and to welcome project volunteers. Informational tables are set up in the Unions and dorms at the beginning of each semester and throughout the year. Hundreds of posters are placed around campus, thousands of leaflets are distributed, and chalk messages are written in classrooms and on sidewalks inviting students to the General Interest Meetings and other events. Mailings are sent to student group leaders and announcements are made at their meetings. Information is distributed through the media as

well, including on campus and off campus newspapers, radio and television.

The WISPIRG office is open almost continuously from 9 am to 9 pm Monday through Friday, often on weekends, and by appointment. On request, numbers of contact people can be distributed to reach after hours.

The organization has weekly core group meetings, weekly project group meetings, weekly intern meetings, bi-weekly chapter meetings, and numerous other ad-hoc and scheduled meetings throughout the semester. Meetings are normally on week nights between 6 and 10 in the evening.

WISPIRG does numerous evaluations to determine the effectiveness of the programs. After events and at the end of the semester each project group devotes the better part of a meeting to evaluating the things that went well and the things that need improvement. As a chapter we spend the last meetings of the semester doing project evaluations and planning.

Before each project begins, clear and tangible goals are established, which serve as the foundation by which the effectiveness of the program is judged. For example, this semester the Environmental Education project group set out to teach 300 elementary school kids three different curricula. They judged their program to be successful, because they taught more than 400 children.

When reviewing the programs, the more objective the criteria used to choose the project and set the goals, the easier it is to evaluate the program's effectiveness. For example, documenting the number of students who attend an event or the number of informational brochures distributed is easy to do, while documenting the number of students educated about

an issue is more difficult. Also, breaking down larger goals to manageable parts facilitates better project evaluations.

WISPIRG's major accomplishments of the past year include the following:

Renewable Energy: WISPIRG-generated letters, postcards, phone calls, and lobbying convinced U.S. Representative Scott Klug to co-sponsor H.R. 188, a bill designed to shift one billion dollars from fossil fuel research to renewable energy research. This issue has generated significant support from the U.S. Congress and the Clinton Administration.

Elementary Environmental Education: WISPIRG educated close to 1000 elementary school students about endangered species, recycling, and air and water pollution. Interns developed the curricula and are working to institutionalize the program throughout the school district.

Earth Day: WISPIRG worked in coalition with other environmental groups to host "Earth Fest," a "fun run," a benefit concert, and a tree planting event. More than 1500 students participated in the various events.

Playground Safety: WISPIRG surveyed thirteen local playgrounds for safety problems and discovered several potential dangers. In an effort to educate the public about the report's findings. WISPIRG held a press conference attended by two local television stations, numerous radio stations, and state newspapers.

Voter Education: WISPIRG staffed a table and a hotline to educate student voters about voting locations and procedures during the Spring Elections.

Dorm Environmental Education: WISPIRG conducted more than 20 education programs in the dorms to teach

students about energy conservation and recycling. Visual demonstrations and a showing of "The Lorax" were part of each program.

Hunger and Homelessness Awareness Week: In November WISPIRG hosted the annual "Hunger and Homelessness Awareness Week." Guest speakers, including homeless advocates, faculty members, and homeless people spoke at our educational events. A panel discussion, a fast, and a "sleepout" were part of a larger ongoing effort to involve students in community volunteer programs in local pantries and shelters.

The Hunger Cleanup: WISPIRG organized the 10th annual "Hunger Cleanup" which raised more than $8,000 for local, state and international relief efforts and involved more than 300 volunteers at 30 work sites in the city.

Canned Food Drives: WISPIRG's "Trick or Treat to Help Madison Eat" on Halloween and regular canned food drives in front of local grocery stores generated more than 1000 pounds of food for local food pantries.

Homelessness Education: WISPIRG talked to hundreds of high school seniors through their social sciences classes about myths surrounding the homeless and ways students could help.

Ancient Forests: WISPIRG helped to generate more public comments to the U.S. Department of Agriculture than ever before in an effort to convince President Clinton to support a strong Ancient Forest Protection Plan.

Recycling: WISPIRG gathered more than 1000 "Cans to Congress" as part of a national effort to gain support for the National Bottle Bill, a deposit system for beverage containers, the most effective recycling program in the world. To date

more than 60 members of the house have signed on as co-sponsors of the bill. WISPIRG also worked to get cities to adopt "Buy Recycled" ordinances which will help to stimulate the market for recycled goods. City councils are still considering our proposals.

Mining Reform: WISPIRG worked with state legislators, environmental groups, and other concerned citizens in an effort to promote state legislation to reform outdated mining laws and bring mining standards up to the level of other industries.

Endangered Species: WISPIRG generated significant grassroots pressure in support of a strengthened Endangered Species Act. More than 4,000 postcards and letters were sent to Congress. The Endangered Species Graveyard and the Endangered Species Memorial on Library Mall helped to raise student awareness and produce media about the issues in an effort to protect local, regional, and national endangered species.

Course Credit Program: WISPIRG sponsored more than 60 interns in this past year, more than in any previous year. Students received course credit through their work with WISPIRG and a University sponsor.

Organization's Budget

In an effort to develop the most effective state organization possible, WISPIRG plans to continue fundraising efforts through the academic year. WISPIRG plans to raise $3,000 through benefit concerts, t-shirt sales, and other grassroots activities, and the Hunger Project has set a $10,000 goal for the Hunger Cleanup, money which goes to local, state, and international hunger relief efforts.

The best way to demonstrate WISPIRG's potential for growth is to demonstrate the successes of another state PIRG. Most PIRGs around the country are organized at the statewide level and have a larger student fee than the one here at UW. In New Jersey, for example, students from 15 of the Rutgers University Divisions reaffirm their support every three years for NJPIRG, funded by a $7.50 fee per student per semester. The referenda commonly turn out 50% of the students to vote. With the resources of all the student volunteers and campus chapter income, NJPIRG has been able to hire a full professional staff, including lobbyists, field organizers, attorneys, and campus organizers, enabling them to affect passage of some of the most cutting-edge legislation in the country, such as the Clean Water Enforcement Act and the Pollution Prevention Act. As a student directed organization, NJPIRG is the leading environmental group in the state.

WISPIRG, too, would like to increase its resources so that students can have a greater impact on their issue concerns. Through a referendum here at Madison and organizing new campus chapters around the state, additional income will allow WISPIRG to hire the professional staff necessary to play an even more effective role on the environmental, consumer protection and democracy issues. In addition, financial increases would enable WISPIRG to produce more educational literature, provide more student services on campus, get students involved in a larger number of projects, and generally address students' desire for hands-on issue experience even more comprehensively. *Therefore WISPIRG is requesting a ten percent increase in GSSF funding for FY'96.

During the previous fiscal year WISPIRG hired one employee who has served as a campus organizer, managing the internship program and helping develop skills training for

volunteers. No University students were hired during the school year. This year WISPIRG has two full-time campus organizers in the state in an effort to expand to other campuses and increase the programmatic output here in Madison.

Note: WISPIRG receives a lump-sum allocation from the University. Our finances are in order and well documented. Specific questions can be directed to WISPIRG's contact person.

WISPIRG looks forward to working with the SSFC and the ASM throughout the upcoming year. While students face numerous organizing challenges, students in Madison and around the state can look forward to many exciting organizing opportunities as well.

ASM OPERATIONS GRANT APPLICATION 1995-96

The Ten Percent Society

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

The Ten Percent Society has worked for the 12 years of its existence to ensure that LGB's have a study environment free of homophobia and harassment. We envision a day when all barriers between LGB's and straight people have fallen and we can all be ourselves w/o fear of verbal or physical abuse. We educate students, faculty, and staff by going into the community on campus in the form of discussion panels in classrooms, dorms and anywhere else that is requested. We also do annual series that work toward this end.

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

Other than educational activities, we have also been active in the political arena as necessary. In the past we have struggled against homophobia in the military and on campus, we have held candidate forums for student areas, and we have gone head to head with the administration as is becoming necessary again. In the future we will continue our newly begun attempt to get domestic partner insurance by networking w/ as many students as are willing.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

We outreach through various means including newspaper ads, postering, and getting into dorms and classrooms. We

also readily co-sponsor (usually in name) other groups' events. Furthermore, we keep watch over other LGB groups to ensure their welfare and monitor their outreach activity offering suggestions &/or resources as appropriate.

ASM OPERATIONS GRANT APPLICATION 1995-96

Progressive Student Network (PSN)

PART I. Organizational Information

1. PLEASE DESCRIBE YOUR ORGANIZATION'S PURPOSE, PHILOSOPHY AND GOALS?

The Progressive Student Network is a coalition of multi-issue student/youth organizations founded in 1980 at Kent State. The UW Madison PSN has been in existence since 1986, making it one of the oldest activist groups on campus. Our group focuses on a wide variety of current issues including military/biotech research on campus, ROTC discrimination against queers, racist mascots in sports, the crisis of hunger and homelessness, free trade (NAFTA/GATT), welfare reform, political prisoners and prison organizing, environmental racism, ecofeminism and women's empowerment, rightwing backlash on campus, the "GOP Contract on America," etc. Often we cosponsor educational speakers and films with other groups -- for ex. the visit by Alerte Belance, the Haitian activist and torture survivor, last Dec. We also publish several widely newsletter such as the *PSNews* and our popular "UW Disorientation Manual."

2. WHAT HAVE YOU DONE IN THE PAST, AND WHAT DO YOU ENVISION DOING IN THE FUTURE TO ACHIEVE THE GOALS ENUMERATED IN QUESTION #1.

PSN has seen a revival this last year with several new energetic members. Some of our more successful events/activities besides the Alerte Belance talk which packed 3650 Hum. include: bringing Harry Fouché to speak about the current Haiti situation, testifying before the Army Corps

about the Exxon Crandon Mine and educating the campus community on this issue, working with the Free Burma Coalition and the Free Tibet group on educational events and protests (i.e., Pepsi dump), organizing letter writing and call ins about GATT, sponsoring panel discussions on prison reform, labor movement, the situation in Chiapas, and the Contract on America. Members of PSN also participated in several national conferences including the "Free the Planet" conference in Philadelphia.

3. HOW DO YOU REACH OUT TO THE STUDENT COMMUNITY?

PSN is a frequent tabler in the student unions and on the Library Mall. We put out many factsheets on relevant campus issues -- for ex. rBGH research, military research, ROTC, etc., as well as the *PSNews* (quarterly) that covers student news from all over the world. Our events are generally well publicized through postering, WORT and lately email postings. This semester we've started a weekly discussion group on such topics as alternative economics and permaculture systems that has attracted new members.

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No. 98-1189

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

**Counsel of Record*

5588

QUESTION PRESENTED

Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.

LIST OF PARTIES

Actual parties to the proceedings in the court of appeals were:

Michael W. Grebe, Sheldon B. Lubar, Jonathan B. Barry, John T. Benson, Brigit E. Brown, John Budzinski, Alfred S. De Simone, Lee S. Dreyfus, Daniel C. Gelatt, Kathleen J. Hempel, Ruth Marcene James, Phyllis M. Krutsch, Virginia R. Macneil, San W. Orr, Jr., Gerald A. Randall, Jr., Jay L. Smith and George K. Steil, Sr., all in their official capacities as members of the Board of Regents of the University of Wisconsin System. Michael W. Grebe, Sheldon B. Lubar, Brigit E. Brown, John Budzinski, Lee S. Dreyfus, Daniel C. Gelatt, Kathleen J. Hempel, Phyllis M. Krutsch and George K. Steil, Sr., are no longer members of the Board of Regents of the University of Wisconsin System; their positions on the Board of Regents have been filled by Patrick G. Boyle, JoAnne Brandes, Bradley D. DeBraska, Guy A. Gottschalk, Toby E. Marcovich, Frederic E. Mohs, Jose A. Olivieri and Grant E. Staszak.

Petitioners herein,

Scott Harold Southworth, Amy Schoepke, Keith Bannach, Rebecka Vander Werf, Rebecca Bretz, Kendra Fry and Jamie Fletcher.

Respondents herein.

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No. 98-1189

In The

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October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 151 F.3d 717 (CA7 1998) (Pet.-Ap. 13a-51a).[1] The Seventh Circuit's denial of the Petition for Rehearing, and the dissents therefrom, are reported at 157 F.3d 1124 (CA7 1998) (Pet.-Ap. 1a-12a).

[1]The abbreviation "J.A." identifies the indicated pages from the parties' Joint Appendix; "Pet.-Ap." refers to the Appendix to the Board of Regents' Petition for Writ of Certiorari; "R." identifies the district court docket entry by number (*see* J.A. 4-7).

The opinion of the United States District Court for the Western District of Wisconsin (Pet.-Ap. 78a-99a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 10, 1998. Petitioners filed a Petition for Rehearing With Suggestion of Rehearing En Banc, which was denied by Order dated October 27, 1998. The petition for writ of certiorari was filed on January 25, 1999, and was granted on March 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Stat. § 36.01(2) provides:

> The mission of the [University of Wisconsin] system is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. Basic to every purpose of the system is the search for truth.

Wisconsin Stat. § 36.09(5) provides:

> The students of each [University of Wisconsin system] institution or campus subject to the responsibilities and powers of the board [of regents], the president, the chancellor and the faculty shall be active participants in the immediate governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the

responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

STATEMENT OF THE CASE

A. Background and Facts.

This case concerns whether the University of Wisconsin-Madison can collect a fee from students, in addition to tuition, to fund services for significant numbers of University of Wisconsin-Madison students and to fund the provision of resources to student groups so they can engage in expressive activity. The parties stipulated that "[t]he process for reviewing and approving allocations for funding [to student groups] is administered in a viewpoint-neutral fashion" (Stip. ¶ 12, Pet.-Ap. 106a). The student organizations' expression runs the full gamut from apolitical to primarily political, and ranges from placards, to art exhibits, to theater performances, to speeches by Nobel laureates, to urging students to let their views be known on specific legislation.

On April 2, 1996, three students attending the University of Wisconsin-Madison law school commenced this action for declaratory and injunctive relief against the Board of Regents of the University of Wisconsin System.[2] Respondents challenged the University of Wisconsin's mandatory student activity fee as compelling them to support

[2] As those students graduated, other students were added as parties.

organizations whose positions they object to, allegedly in violation of their rights of free speech, freedom of association and freedom of religion under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(3) and (4).

The parties entered a stipulation of facts (Pet.-Ap. 100a-112a), and both sides moved for summary judgment, supplementing the stipulation with affidavit and deposition testimony. The district court granted respondents' motion and entered judgment declaring the University of Wisconsin's student fee system in violation of the First Amendment (Pet.-Ap. 74a-75a). The Board of Regents appealed to the Seventh Circuit Court of Appeals. The first appeal was dismissed for lack of jurisdiction in an unpublished decision, 124 F.3d 205 (CA7 1997), because the district court had only addressed respondents' request for declaratory relief, not their request for injunctive relief (Pet.-Ap. 66a-73a). On remand, the district court issued an injunction establishing a detailed procedure for students to opt out of payment of fees going to student groups determined to be predominantly engaged in political and ideological activities (Pet.-Ap. 61a-65a). The Board of Regents appealed a second time, challenging both the district court's declaratory and injunctive rulings. Respondents filed a cross-appeal on the injunction issue. The court of appeals vacated part of the district court's injunction, but affirmed the lower court's principal holding that the challenged fee system violated the First Amendment. 151 F.3d 717 (Pet.-Ap. 13a-51a).

The Wisconsin statutes establish a broad mission for the University of Wisconsin System. Wis. Stat. § 36.01(2). The parties stipulated that under Wis. Stat. § 36.09(5), students have primary responsibility for the formulation and review of policies concerning "student life, services and interests," and that at the University of Wisconsin-Madison, the

Chancellor has determined that "student life, services and interests" includes: (a) the registration and regulation of student organizations; (b) non-academic social, cultural and recreational programs for students; and (c) services that are initiated and operated by students (Stip. ¶¶ 2, 10; Pet.-Ap. 101a, 105a).[3] Respondents agreed that "[t]he University obviously has a primary interest in promoting good education by creating the appropriate atmosphere for exchange of ideas on campus" (Plaintiffs' Reply Br., No. 96-C-0292-S, at 6 (W.D. Wis. filed Oct. 27, 1996), R. 42). The segregated fee enables the University of Wisconsin-Madison to provide services that are initiated and operated by students (Stip. ¶ 10; Pet.-Ap. 105a), and to enrich campus and student life in ways that are distinguishable from instruction supported by tuition.

For the 1995-96 academic year, full-time students attending the University of Wisconsin-Madison were required to pay a "segregated fee" of $166.75 per semester, or $331.50 for the entire year (Stip. ¶ 5; Pet.-Ap. 102a-103a).[4] The University of Wisconsin-Madison's segregated fee consists of both an "allocable" and a "non-allocable" portion (Stip. ¶ 4; Pet.-Ap. 101a-102a). The larger of the two is non-allocable, so-called because while students have input into budgeting for non-allocable expenditures, the Chancellor has ultimate authority over them (Stip. ¶ 7; Pet.-Ap. 104a). Examples of items funded through the non-allocable category include debt

[3] As University of Wisconsin-Madison students, respondents did not challenge the policies and practices of the other twenty-five campuses of the University of Wisconsin system.

[4] The imposition of a student fee separate from tuition has a long history at the University of Wisconsin, dating from at least 1848. In 1875 the fees covered such expenses as "heating and lighting the university hall and public rooms, music, each diploma, and a matriculation fee in the law department." *The State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159, 163-64, 11 N.W. 472 (1882). In 1949, the fees covered "admission to athletic contests, concerts, class dues, cap and gown fees, science laboratory fees, music fees, etc." 38 Op. (Wis.) Att'y Gen. 516, 518 (1949).

service, fixed operating costs of auxiliary operations, required reserves, the Wisconsin Student Union, the first and second year of the recreational sports budget and University Health Services (Stip. ¶ 9; Pet.-Ap. 105a; *see also* Stip. ¶¶ 5, 6; Pet.-Ap. 102a-104a). For the 1995-96 school year, $134.05 of a full-time student's segregated fee per semester was for non-allocable expenditures, which respondents did not challenge (J.A. 37).

The remaining portion of the 1995-96 segregated fee, $32.70 per semester, consisted of "allocable" fees (Stip. ¶¶ 5, 6; Pet.-Ap. 102a-104a). At the University of Wisconsin-Madison, the allocable category of the segregated fee supported the General Student Services Fund (GSSF), the Child Care Tuition Assistance Program, the Wisconsin Union Directorate Distinguished Lectures Series, the third year of the recreational sports budget, the Associated Students of Madison (ASM) budget, Wisconsin Student Public Interest Research Group (Wisconsin Student PIRG or WISPIRG) and the United Council (Stip. ¶ 11; Pet.-Ap. 105a-106a).

The three major categories at issue in this case are GSSF funding of student services, ASM funding of student groups and funding for the Wisconsin Student Public Interest Research Group.[5]

[5] It should be noted that partisan political activities represent one of two content-based exceptions to mandatory fee funding for student groups (UW Financial Policy and Procedure Paper No. 20 (June 8, 1987), J.A. 244-52; *see also* GSSF Policy Statement (J.A. 236-39)). The other exception, "religious in nature" (J.A. 252; *see also* GSSF Policy Statement, "*primarily* religious orientation" (J.A. 238)), would be invalid under *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Respondents did not claim that they were members of any group that was improperly denied funding and no evidence was presented of a registered student organization having requested but being denied funding.

1. *GSSF Funding of Student Services.* "Applications to the GSSF are open to all registered student organizations, university departments or community based services" (Stip. ¶ 14, Pet.-Ap. 106a).[6] All of the allocable monies distributed from the GSSF fund are allocated through the Student Services Finance Committee, which is part of the ASM student government (Stip. ¶¶ 12, 13; Pet.-Ap. 106a). The General Student Services Fund received $13.42 per semester per student in 1995-96 (Stip. ¶ 5; Pet.-Ap. 102a-103a), which was in turn distributed as funding for "those services which provide direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13; Pet.-Ap. 106a).

The service organizations receiving such GSSF funding in the 1995-96 academic year included fifteen organizations[7] only five of which were challenged by respondents, accounting for $1.75 in fees per student per semester.[8]

The Associate Dean of Students at the University of Wisconsin-Madison described the role of the organizations funded by GSSF as follows:

> During the past ten years, a number of student organizations have been formed to deliver particular services to students. Several

[6] For a full list of guidelines for GSSF-funded services *see* J.A. 236-39.

[7] Thsee were: General University Tutorial Service, the Student Tenant Union, the Campus Women's Center, the UW Greens, the Lesbian, Gay, & Bisexual Center, the Community Law Office, WLHA Student Radio, SAFEride Bus, Madison AIDS Support Network, Rape Crisis Center, Men Stopping Rape and Vets for Vets (Stip. ¶ 17; Pet.-Ap. 108a).

[8] These were: Campus Women's Center ($0.47 of the segregated fees per student per semester), UW Greens ($0.10), Lesbian, Gay, & Bisexual Center ($0.30), Madison AIDS Support Network ($0.36) and United States Student Association ($0.52) (*see* Stip. ¶¶ 5, 6, 17; Pet.-Ap. 102a-104a, 108a and J.A. 37-38 for method of calculation).

> of these service groups have applied for and received segregated fee allocations through the General Student Services Fund ("GSSF") to cover costs for staff, office rental, office supplies, etc. Legal assistance, tutoring, tenant information, and support for veterans are a few examples of these student-initiated, student-run service programs. This group of services also includes the Lesbian, Gay, Bisexual Center and the Campus Women's Center which provide information and support for LGB students and women at the University, groups that have been and may yet be targets of discrimination, attack or ignorance. For many students, these centers with their staff, small libraries, and various programs are important sources of support and serve as evidence that they are welcomed to the University community. The Madison AIDS Support Network ("MASN") is a larger community information and support organization receiving financial support from several different sources in Dane County. UW-Madison students provide segregated fee funding for additional staff to enable MASN with its county-wide responsibilities to target the University community for special efforts to provide information about AIDS to students. UW Greens and Wisconsin Student PIRG both assist students who wish to investigate environmental issues that affect the local, state, national, and international community and to consider how they might wish to become involved in seeking the resolution of the problem.

(Howard Aff. ¶ 3; J.A. 179-80).

Despite the stipulation that GSSF funds "those services which provide direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13, Pet.-Ap. 106a), respondents repeatedly claim that the only "service" the GSSF-funded organizations offer is that "of disseminating the funded organization's viewpoints on campus" (Resp. to Cert. Pet., No. 98-1189, at 3 (filed Feb. 26, 1998)). To the contrary, while advocacy is integral to some services provided, the record shows that the GSSF-funded organizations provide important services, with political speech only a fraction of a larger range of activities. Moreover, respondents' frequently rely on disputed facts. For example, the purpose of the Campus Women's Center is "to provide a variety of women centered support services, to educate the campus community on a number of women's issues, and to serve as a resource and referral center for all students" (UW-Madison Campus Women's Center brochure, R. 34). As part of its activities, the center has offered support groups in areas such as "self-empowerment, body image & eating disorders, maintaining and establishing healthy relationships, sexuality acceptance, single motherhood, and survivors of sexual assault" (*id.*). In opposing certiorari, respondents claimed that the "Campus Women's Center worked against a bill requiring 'informed consent' from women seeking abortion" and quoted from "The Source," a newsletter published, but not written, by the Campus Women's Center (Resp. to Cert. Pet. at 3, quoting J.A. 96). Preceding the article in The Source Newsletter is a box describing the newsletter and containing a statement that "[o]pinions expressed in The Source are those of the contributors and do not necessarily reflect those of the collective" (J.A. 93). The Outreach and Volunteer Coordinator at the Campus Women's Center filed an affidavit in the district court stating that "[w]e view our newsletter as a forum for the expression of ideas important to women, regardless of which side of an issue is being supported" (Onkeles Aff. ¶ 5, J.A. 175-76), and that "[t]he Women's Center has never taken a stand on the issue of abortion. We

have actively decided not to take a stand in order to avoid alienating women from the Center" (Onkeles Aff. ¶ 7, J.A. 176).

Similarly, respondents object to funding the UW Greens, claiming that they distributed "campaign literature supporting Ralph Nader's bid for President on the Green Party ticket" and "lobbied at the state legislature on various bills dealing with mining" (Resp. to Cert. Pet. at 6). Both allegations are directly contravened by testimony under oath below. John Peck, a part-time staff person at UW Greens, filed an affidavit disputing both statements. According to Mr. Peck, "UW Greens does not prepare or distribute the literature [respondents] have provided of the Greens party. The UW Greens does have these documents in its files. If a person wants to review the UW Greens' files . . . they are welcome . . ." (Peck Aff. ¶ 7, J.A. 167). He further stated that the referenced bills "were not written on behalf of the UW Greens . . . . Representative Spencer Black contacted the groups and asked them if they wanted to join in sponsoring the bills . . . . No monies from the UW Madison student activity fee funded the co-sponsoring" of the bills (Peck Aff. ¶¶ 5, 9, J.A. 167).[9]

Under Wis. Stat. § 36.09(5), the Board of Regents has final authority to approve or disapprove the GSSF-funded allocations (Stip. ¶ 23; Pet.-Ap. 110a). The

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[9] In the two instances of GSSF-funded organizations that respondents put before this Court in their Brief in Opposition to the Board of Regents' Petition for Certiorari, respondents' references to facts in the record were not to undisputed facts. If the facts concerning what expressive activity is engaged in by individual organizations are material, then they are disputed, and respondents were not entitled to summary judgment. Fed. R. Civ. P. 56. *See Hunt v. Cromartie*, 119 S. Ct. 1545, 67 U.S.L.W. 4306, 4309 (U.S. May 17, 1999) ("Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible or different interpretations of inferences by the trier of fact.").

record below reflects that the Board of Regents exercised its authority to disapprove an allocation on only one occasion.[10]

2. ASM Funding to Student Organizations For Expressive Activity. Allocable feeds of $4.28 per semester in 1995-9\ went to the Associated Students of Madison (ASM), the University of Wisconsin-Madison's student government (Stip. ¶ 5; Pet.-Ap. 102a-103a). ASM is democratically-elected.[11] The $4.28 funded both the operations of the ASM student government and monies to be disbursed to over 100 Registered Student Organizations (RSOs) in 1995-96 through an application and grant process. The parties stipulated that this process is viewpoint-neutral (Stip. ¶¶ 12, 18, and 25, Attach. c; Pet-Ap. 106a, 108a-109a, 111a; J.A. 39, 138-52). Registered Student Organizations can apply to ASM each year for events, operations or travel

[10] In 1991, a committee of the Board of Regents considered then-University of Wisconsin-Madison Chancellor Donna Shalala's denial of a student government grant to the Women's Transit Authority on the grounds that its employment and service practices violated federal and state statutes and University policy by discriminating on the basis of gender. The student government appealed the Chancellor's decision to the Board of Regents, which after review upheld the Chancellor's decision (J.A. 156).

[11] In fact, in 1993 respondent Southworth was elected chair of ASM's predecessor student government and officially disbanded the student government (Southworth Dep. at 36; R. 23).

grants all of which are defined in the Student Organization Handbook 1996-97 (Stip. ¶ 25, Attach. h).[12] To qualify as a Registered Student Organization, an organization must meet certain criteria, including, that it (1) be a not-for-profit group with an established organizational structure; (2) be composed mainly of students; (3) be controlled and directed by students; (4) relate to student life on campus; and (5) comply with all nondiscrimination laws and policies (Stip. ¶ 14, Pet.-Ap. 106a-107a). These requirements for RSOs apply regardless of whether the organization seeks any ASM funding.

The University of Wisconsin-Madison's Dean of Students described the importance of the role of RSOs at the University:

> As students who lead over 500 organizations at the University each year, you make invaluable contributions to the "second curriculum" (extra-curricular activities) in our community. You and your members plan and produce a wide range of programs such as movies, chess tournaments, nationally known speakers, and folk dancers. Through these events, you make a large and complex University smaller for thousands of students.

[12] The parties' stipulation provides the following description of the three funding categories: (1) *Event Grants*: "ASM funds events sponsored by Registered Student Organizations. These events must be in the Madison area and open to all University students;" (2) *Operation Grants*: "Recognizing that student organizations play a significant role in the education of UW-Madison students, ASM has established the *Operations Grant Fund* to support the ongoing organizational needs of student organizations. Printing, postage and office supplies are the major categories of funding;" and (3) *Travel Grants*: "The travel being funded must be central to the purpose of the organization" (Stip. ¶¶ 18 and 25, Attach. h; Pet.-Ap. 108a-109a, 111a; J.A. 302-03).

> You also provide opportunities for your members to develop leadership skills.

(Stip. ¶ 25, Attach. h; J.A. 253).

Over 100 Registered Student Organizations applied for and received funding in the 1995-96 academic year as part of the ASM process (Stip. ¶ 25, Attach. c; J.A. 138-52). Respondents objected to funding only twelve of the registered student organizations that received monies through this process during the 1995-96 academic year.[13] In 1995-96, less than $0.43 from each respondent's fees per semester was attributable to these challenged groups (mathematical result derived from Stip. ¶¶ 5, 25, Attach. c, *see, e.g.*, J.A. 38-39). The challenged RSOs engaged in a range of expressive activities and included some principally political speech. For example, respondents objected to speech by the International Socialist Organization (*see* Resp. to Cert. Pet. at 7-9). Respondents also singled out the Progressive Student Network's "Disorientation Manual" for criticizing petitioners before this Court, the Board of Regents, and Wisconsin's Governor, who appoints them (*id.* at 6-7). The twelve ASM-funded groups to which respondents object added the following expression to the University of Wisconsin-Madison campus: a photo exhibit of the Mexican Revolution (J.A. 218); lectures by prominent human rights or political activists from Central America, including a Nobel Peace Prize winner (J.A. 216); a lecture by a Haitian refugee (J.A. 213-14); a lecture by the late Cesar Chavez (J.A. 218); the production of several theatrical performances (J.A. 219-20); the International Socialist Organization's sponsorship of

[13] These were: Progressive Student Network; International Socialist Organization; Ten Percent Society; Amnesty International; Community Action on Latin America; La Colectiva Cultural de Aztlan; Militant Student Union of the University of Wisconsin; Student Labor Action Coalition; Student Solidarity; Student NOW (Students of National Organization for Women); MADPAC; and Madison Treaty Rights Support Group.

debates with the College Republicans and student newspaper, *The Badger Herald* (J.A. 205); and a lecture by the consulate-general of the Israeli embassy (J.A. 228). None of this expressive activity, whether or not political, was made on behalf of respondents or other students. University funding policy required an express statement to this effect (J.A. 41).

Both the funded RSOs and their allocated amounts change annually and cannot be predicted beforehand in the budgeting process of the Board of Regents or the RSOs themselves. There are over 600 RSOs and the segregated fee was a source of funding *available* to all of these organizations, although the majority of RSOs did not request any funding (*see* J.A. 255-99 for a list of RSOs). "Printing, postage and office supplies are the major categories of funding" for the ASM operations grants (Stip. ¶ 25, Attach. h at 39; Pet.-Ap. 111a; J.A. 303) and constituted the sole or major categories of ASM operations grant funding for all of the student organizations receiving such grants to which respondents object (*see* J.A. 203-04, 207-08, 210-11, 213, 215-19, 220-22, 225-29, 230-31). RSOs "receiving funding do not get cash or a lump sum payment from the ASM;" they must submit "a requisition or other appropriate business form requesting payment" (Stip. ¶ 21; Pet.-Ap. 110a). With certain exceptions not relevant here. "no money actually goes to the organization itself to pay its bills" (Stip. ¶ 21; Pet.-Ap. 110a). RSOs "can reserve University facilities for meetings and events [and] [n]onacademic space in . . . many . . . campus buildings, including recreational, athletic and outdoor campus areas" (Stip. ¶ 24; Pet.-Ap. 110a). RSOs funded by the fee come out on different sides of issues (*see, e.g.*, Schoepke Dep. at 17, 25, R. 22; Bannach Dep. at 21, R. 21; Stip. ¶ 25, Attach. c; J.A. 138-52). At least three respondents were members of student organizations receiving this type of funding (Bannach Dep. at 21, R. 21; Schoepke Dep. at 17, R. 22; Southworth Dep. at 6, R. 23). In addition to the twelve organizations to which respondents object, ASM funding in 1995-96 went to the

Federalist Society, the Tort Reform Debate Club, the Law Revue, the American Society of Landscape Architects, the Pre-Veterinary Association and Chi-Alpha Christians in Action (J.A. 139, 142-43, 148, 150).

In both courts below, the Board of Regents and respondents regarded the provision of these funds as creating a limited public forum for student speech. *See, e.g.*, Appellees' Br., No. 97-1001, at 26 (7th Cir. filed Mar. 17, 1997) ("[t]he students do not dispute that the University has created a public forum of funding for student groups"). The parties agreed that the funding of this forum was "viewpoint-neutral" (Stip. ¶ 12, Pet.-Ap. 106a). The Board of Regents has final authority to approve or disapprove the allocations by the student government (Wis. Stat. § 36.09(5); Stip. ¶ 22; Pet.-Ap. 110a), although no evidence was presented that any ASM allocation had been disapproved in the years under consideration (J.A. 156).

3. *Wisconsin Student Public Interest Research Group Funding.* Seventy-one cents of the 1995-96 full-time student segregated fee was allocated to Wisconsin Student Public Interest Research Group (Stip. ¶ 6; Pet.-Ap. 104a). Students directly approved funding of Wisconsin Student PIRG through a campus-wide referendum (J.A. 40), but the budget process is administered by the Student Services Finance Committee as a GSSF grant (J.A. 172). "Wisconsin Student PIRG provides training and co-curricular educational opportunities for students to become involved in issues of importance to them, through which they can gain valuable real world experience. Students may also participate in course credit internships through Wisconsin Student PIRG, under the guidelines established by the University of Wisconsin" (Schumann Aff. ¶ 4; J.A. 170). In the 1994-95 academic year, more than 1,500 students were involved with Wisconsin Student PIRG volunteer and internship programs, with more than sixty interns receiving course credit (R. 26, Bates Nos. 285, 287).

In opposing certiorari respondents claimed that "WISPIRG published a Congressional scorecard for the 1994 election in which it evaluated each candidate for the House of Representatives" and that WISPIRG asked legislators to introduce three bills to the Wisconsin Assembly to restrict mining in Wisconsin (Resp. to Cert. Pet. at 4). However, the Wisconsin Student PIRG Organizing Director testified by affidavit that "Wisconsin Student PIRG does not endorse or oppose candidates for public office and does not publish or distribute materials relating to the legislative records o[f] elected public officials" (*id.*, ¶ 11; J.A. 172). Similarly, she clarified that "Wisconsin Student PIRG does not sponsor legislation in the Wisconsin State Legislature . . ." (Schumann Aff. ¶ 10; J.A. 172). She noted that Wisconsin Student PIRG is separate from Wisconsin State Public Interest Research Group, but the two have been confused because both organizations sometimes employ the same acronym, WISPIRG (Schumann Aff. ¶ 7; J.A. 171).

The Associate Dean of Students at the University of Wisconsin-Madison specifically noted that "WISPIRG especially has been effective in helping students identify projects that fit with their academic work in the classroom so that students can experience both service and learning around the same topic" (Howard Aff. ¶ 3; J.A. 180).

This allocation, like the other ASM and GSSF allocations, is submitted to the Chancellor and the Board of Regents for review and approval pursuant to Wis. Stat. § 36.09(5).

In all, respondent students objected to the funding of eighteen service and registered student organizations in the 1995-96 school year. Respondents agreed that the University of Wisconsin-Madison is not advocating a particular point of view through segregated fee funding (J.A. 39; Bannach Dep. at 13, R. 21; Schoepke Dep. at 25, R. 22). Respondents do not oppose the funding of spatial fora by the University of Wisconsin-Madison, such as providing classrooms, buildings, kiosks or bulletin boards (J.A. 39-40; Southworth Dep. at 25-28, R. 23; Bannach Dep. at 51, R. 21). Respondents do not oppose the student organizations' use of other University of Wisconsin-Madison resources, such as staff and computers with internet access, to facilitate the spread of organizations' views (J.A. 40; Southworth Dep. at 25-26, R. 23). Respondents supported the views of some funded organizations, and were even members of other organizations receiving funding (J.A. 39; Schoepke Dep. at 25, R. 22; Bannach Dep. at 29, R. 21; Southworth Dep. at 5-6, R. 23). Respondents examined with much less intensity in this litigation the expressive activities of RSOs which received funding to which they did not object or whose views they support.

B. The District Court's Decisions.

The district court described the competing interests at issue in this case as the students' "constitutional right not to be compelled to financially subsidize political or ideological activities balanced against the Board of Regents' authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues" (Pet.-Ap. 86a). The district court applied a mixed analysis with elements of a "strict scrutiny" test and a "germaneness" test (from *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) (the expenditure of compulsory union dues) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) (the expenditure of compulsory bar dues)) (Pet.-Ap. 85a-91a). The district court

concluded that the funding of student organizations whose primary purpose is to advance political or ideological causes is "not germane to the university's function and accordingly not narrowly tailored to avoid the unnecessary infringement of [respondents'] First Amendment rights" (Pet.-Ap. 99a). In so doing, it substituted its judgment for that of the Wisconsin Legislature, the University of Wisconsin and the student government.

Relying principally upon *Smith v. Regents of University of Cal.*, 844 P.2d 500 (Cal. 1993), the district court concluded that the educational benefits of *some* of the student organizations challenged by respondents were incidental to their primary political or ideological purposes, and as to those groups, mandatory funding violated respondents' First Amendment rights (Pet.-Ap. 92a-93a). The court examined individual student groups and concluded that the individual group's expressive activities did not create a forum, and rejected the Board of Regents' argument that a limited public forum was being created by providing funding to a body of numerous RSOs (Pet.-Ap. 95a-97a).

As noted above, the district court's original decision addressed only declaratory relief. On remand the district court granted injunctive relief that closely tracked the procedure established by the Wisconsin Supreme Court for arbitrating objections to the Wisconsin Bar Association's expenditures (Pet-Ap. 58a-59a; *cf.* Wis. SCR 10.03(5)(b)1.-5.). That specific procedure was vacated on the Board of Regents' second appeal (Pet.-Ap. 46a-50a), and the respondents did not seek review of that portion of the court of appeals' judgment.

C. The Seventh Circuit's Decision.

The Seventh Circuit affirmed the district court's ruling that the distribution of the mandatory fee payments to the eighteen organizations violated respondents' rights of

free speech and freedom of association. Consistent with the parties' agreement that the challenged funding mechanism resulted in the creation of a non-spatial forum, the Seventh Circuit recognized that in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, "[t]he Supreme Court held that the student activity fees created a forum of money and that once established the forum had to be made available on a viewpoint-neutral basis." 151 F.3d at 722 (Pet.-Ap. 22a). It was this aspect of the funding mechanism that the court of appeals perceived as offending First Amendment principles: "[i]f the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights." *Id.* at 730 n.11 (Pet.-Ap. 40a).

In reaching this conclusion, the court of appeals looked to *Abood* and *Keller*'s standards of germane organizational speech as the general principles guiding its decision. The actual determination that the challenged fee mechanism violated the First Amendment proceeded from the court of appeals' attempt to apply the three-prong test of whether union expenditures violated objecting employees' First Amendment rights, which a majority of this Court had endorsed in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (but whose application had been agreed to only by a plurality).

Upon petition for rehearing, a majority of the judges in active service on the Seventh Circuit voted to deny rehearing, but four judges voted to grant rehearing *en banc*. Judge Ilana Diamond Rovner filed an opinion dissenting from the denial of rehearing *en banc*, which was joined by Judges Diane P. Wood and Terence T. Evans. Judge Rovner wrote that "the free expression of a wide range of ideas is central to the educational mission of a university," and noted respondents' concession that the funding arrangement created a forum. 157 F.3d at 1125 (Pet.-Ap. 3a). Judge Wood also

authored a dissent, joined by Judges Rovner and Evans, writing that forum-creation analysis, rather than compelled speech analysis, provided the appropriate standard. Judge Wood recognized the validity of a compelled subsidy of a neutral forum for speech, particularly on university campuses. Like Judge Rovner, Judge Wood emphasized the broad ramifications for public universities of the court of appeals' decision. 157 F.3d at 1127 (Pet.-Ap. 61).

The Board of Regents filed a petition for certiorari seeking review of two questions raised by the Seventh Circuit's decision. This Court granted the petition limited to a question restated by the Court.

SUMMARY OF ARGUMENT

Universities have a long tradition of being centers for vigorous discourse as part of their role in preparing the leaders of tomorrow, and this tradition has never been limited to the classroom. The Board of Regents of the University of Wisconsin System has determined that an essential function of its educational mission is to encourage students to engage in the expression of ideas of interest to them, by providing a modest subsidy to facilitate expressive activity. The Board of Regents has also determined that it is essential to provide certain services to a diverse student population, which at times also involve the expression of diverse viewpoints. Accordingly, the University funds these services and expressive resources through mandatory student fees.

In providing financial resources to student organizations at the University of Wisconsin-Madison to facilitate their expressive activities, the University is creating a limited public forum, as this Court found the University of Virginia had created in *Rosenberger*. In this case, respondents, several current or former undergraduate and law students at the University of Wisconsin-Madison, do not dispute that the challenged student fees fund student services or that they result

in a *Rosenberger* forum. However, respondents contend that payment of the mandatory student fees violates their First Amendment rights of freedom of speech and association insofar as any funding goes to organizations whose views they oppose. Respondents claim a constitutional right to opt out of funding student services and the creation of a forum.

This case places before the Court the question reserved in *Rosenberger*, of whether the First Amendment requires that an objecting student be permitted to opt out of funding a limited public forum in a university setting.

The University's funding of services and its creation of a limited public forum through the distribution of mandatory student fees does not compel speech by respondents or by any other students. There can be no contention that each of the funded registered student organizations (over 100) speak on behalf of all students. There is no single organization that all students must join or that represents all students. The parties stipulated that the student groups are funded on a viewpoint-neutral basis. With respect to student services, the parties stipulated that the funded services were for the benefit of significant numbers of students at the University of Wisconsin-Madison.

Respondents do not, as a matter of constitutional mandate, enjoy the right to avoid paying for the provision of student services and the creation of a forum for robust campus debate and dialogue, any more than they enjoy the right not to pay tuition that results in courses being taught with whose content they disapprove. The funding of student services and a forum for the expression of diverse views does not offend the First Amendment. It instead furthers First Amendment values by promoting vigorous debate in an educational setting entirely suited to that discussion. The court of appeals erred when it failed to apprehend the distinction between being forced to fund a podium for all speech and being forced to fund an individual group speaking at that podium. There is no

constitutional right to opt out of funding a spatial forum, and there is no reason constitutional principles should apply differently to a non-spatial forum. Respondents can obtain funding for the expressive activities of student groups they choose to form or join. Particularly where speech is taking place at a large, public university, the First Amendment's answer to respondents' objections to the speech with which they disagree is more, not less, speech.

The outcome of this case is not dictated by the holdings in *Abood*, *Keller* and *Lehnert*. The differences between the agency-shop unions and the mandatory state bar association that were the sole voices of those objecting (thereby compelling speech), make the principles for which they stand inapposite to this University setting. In *Abood*, *Keller* and *Lehnert*, the funded speech was that of the compulsory membership organization itself—the union's own lobbying activities in the Legislature; the bar association's efforts to promote a nuclear free zone. By contrast, in the instant case, the challenged funding facilitates the speech of many groups, through a system that respondents stipulated distributes monies on a viewpoint-neutral basis.

Alternatively, if this case is properly analyzed under the germaneness tests set forth in *Abood*, *Keller* and *Lehnert*, in light of the Wisconsin Legislature's establishing of a broad educational mission for the University of Wisconsin System, and in light of the viewpoint-neutral allocation of student fees to create a forum for the expression of a multiplicity of ideas and the funding of services to a diverse student population, the challenged system is constitutional. The University should be funding services to aid its students and should be creating an educational environment for the expression of diverse viewpoints to foster vigorous debate, as part of its legislatively-established mission to "search for truth." Wis. Stat. § 36.01(2).

ARGUMENT

I. COMPELLED FUNDING OF SERVICES AND OF A LIMITED PUBLIC FORUM FOR ROBUST DEBATE IN A UNIVERSITY SETTING DOES NOT CONSTITUTE COMPELLED SPEECH OR ASSOCIATION IN VIOLATION OF THE FIRST AMENDMENT.

This Court has recognized that the First Amendment includes a right *not* to speak and a right *not* to associate in certain circumstances. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (West Virginia law compelling public school students to salute and pledge allegiance to the United States' flag held violative of First Amendment); *Elrod v. Burns*, 427 U.S. 347 (1976) (sheriff's employees could not be compelled to support political party as condition of employment); and *Wooley v. Maynard*, 430 U.S. 705 (1977) (New Hampshire's law compelling license plate display of state's motto, "Live Free or Die," violated First Amendment rights of objecting drivers).

This Court's precedent has also recognized the unique role of universities as places for development, expression, debate and synthesis of ideas, which does not stop at the classroom door. *See, e.g., Rosenberger*, 515 U.S. at 836 ("The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment"; college and university campuses are "vital centers for the Nation's intellectual life . . . ."); *Regents of University of California v. Bakke*, 438 U.S. 265, 312 (1978) ("The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by . . . 'exposure' to the ideas and

mores of students as diverse as this Nation of many peoples."); *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the "'marketplace of ideas.'"); and *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'").

In the present case, the speech funded by the University of Wisconsin-Madison's mandatory student fees ranges from non-political speech to political speech incidental to the provision of services, to political speech by organizations whose very purpose is political. While most speech enjoys First Amendment protections, political speech is the primary concern of the First Amendment. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

In the proceedings below, a tension was believed to exist between a university's role in promoting diverse inquiry and discourse on the one hand, and the right not to be compelled to speak or associate on the other hand. This was, however, a false dichotomy. Respondents were not required either to speak or to become members of any group, but merely to fund, along with all other students at the University of Wisconsin-Madison, a limited public forum in which all might participate.

This Court has identified three types of fora: traditional public fora (such as public parks and streets), limited or non-traditional public fora (where the government has opened up its property to public expressive use, *e.g.*, a school that has opened up its facilities for after-hours activities), and non-public fora (a forum not opened to the public or not a forum at all). *See Arkansas Educ. Television Com'n v. Forbes*, 118 S. Ct. 1633, 1641 (1998). "This Court has recognized that the campus of a public university, at least

for its students, possesses many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). In *Widmar*, this Court found that the University of Missouri at Kansas City had created a limited public forum by accommodating the meetings of student groups in university buildings. *Id.* at 267. *See also Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993) (after-hours access to public school facilities constituted a limited public forum). This Court found in *Rosenberger* that a public university could create a limited public forum by providing funds to cover publication costs of student organizations. 515 U.S. at 825.

Rosenberger involved a challenge to a policy of the University of Virginia authorizing payment of printing costs of student publications, but prohibiting payment for a student publications which "'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'" 515 U.S. at 823. Holding that the viewpoint-based denial of funding transgressed the student's right of free speech, and rejecting the University's argument that funding the publications of religious student groups violated the Establishment Clause, this Court found that a public university could create a limited public forum by providing payments from a Students Activities Fund (SAF) to outside contractors for the printing costs of student group publications. 515 U.S. at 825. The Court stated that "[t]he SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. *See, e.g. Perry Ed. Assn.[v. Perry Local Educators' Assn.*, 460 U.S. 37], 46-47[, (1983)] . . . (forum analysis of a school mail system); *Cornelius [v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788], 801[, (1985)] . . . (forum analysis of charitable contribution program)." *Rosenberger*, 515 U.S. at 830. However, the student publications themselves were not the forum.

In the present case, the ASM funding at the University of Wisconsin-Madison creates a *Rosenberger* forum. Respondents "do not dispute the University has created an open forum for funding, like the Supreme Court found that the University of Virginia had done for student publications in *Rosenberger*" (Plaintiffs' Reply Br. at 3 (W.D. Wis. filed Oct. 27, 1996), R. 42). The court of appeals also understood that in *Rosenberger*, "[t]he Supreme Court held that the student activity fees created a forum of money and that once established the forum had to be made available on a viewpoint-neutral basis." 151 F.3d at 722 (Pet.-Ap. 22a).

The facts that led this Court to find in *Rosenberger* that a forum had been created by the University of Virginia's system of funding student publications are very similar to the facts of how the segregated fees are distributed at the University of Wisconsin. The students at the University of Virginia paid a mandatory fee of $14 per semester that went to the SAF. *Rosenberger*, 515 U.S. at 824. Likewise, the students at the University of Wisconsin pay a mandatory fee each semester, a small part of which ($4.28) goes to the ASM for distribution to over 100 RSOs for operations, travel or events grants. The purpose of the SAF at the University of Virginia was to "support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" *Id.* This is equally true for the segregated fees at the University of Wisconsin. *See, e.g.*, J.A. 303 (ASM grants recognize the "significant role" that RSOs play "in the education of UW-Madison students"). At the University of Virginia "[t]he Student Council, elected by the students, ha[d] the initial authority to disburse the funds, but its actions [were] subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs." *Rosenberger*, 515 U.S. at 824. At the University of Wisconsin, the ASM has comparable authority with oversight by the Board of Regents and University administration (Stip. ¶¶ 3, 12, 23; Pet.-Ap. 101a, 106a, 110a). The University of Virginia authorized payments from its SAF to outside contractors, called "Contracted

Independent Organizations" (CIOs), for printing costs of publications issued by student groups. *Rosenberger*, 515 U.S. at 824. At the University of Wisconsin, "[e]xcept for membership fees paid in a lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the organization itself to pay its bills," organizations must submit requisitions (Stip. ¶ 21, Pet.-Ap. 110a). In *Rosenberger*, a CIO had to pledge not to discriminate in its membership and had to include a disclaimer in all printed materials stating that it was independent of the University. *Rosenberger*, 515 U.S. at 823. At the University of Wisconsin, RSOs likewise cannot discriminate (Stip. ¶¶ 14, 18, Pet.-Ap. 106a-109a; J.A. 41), and must include a disclaimer that the RSOs' views are not those of ASM (J.A. 34, 41). Both Virginia CIOs and Wisconsin RSOs, enjoy access to their respective university's facilities, including meeting rooms and computer terminals. *Rosenberger*, 515 U.S. at 843; (Stip. ¶ 24, Pet.-Ap. 110a; J.A. 40). In *Rosenberger*, this Court found that the "object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life." *Id.* at 840. As attested to by the Dean and Associate Dean of Students at the University of Wisconsin (J.A. 179, 253), and perhaps even more so by the very expression respondents have identified as objectionable (J.A. 57-79, 83-125, 130-32), the University of Wisconsin has succeeded in creating the same type of vibrant forum on its Madison campus.

In holding that the University of Virginia's funding of student publication costs created a limited public forum, the Court in *Rosenberger* explicitly reserved the question raised by this case:

> The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is

> expended for speech to which he or she does not subscribe. *See Keller* [citation omitted]; *Abood* [citation omitted].

Id. at 840. Similarly, in her concurring opinion in *Rosenberger*, Justice O'Connor wrote:

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. [citations to *Keller* and *Abood*]. There currently exists a split in the lower courts as to whether such a challenge would be successful.

Id. at 851 (O'Connor, J., concurring) (citations omitted). In the present case, this Court is presented with the question reserved in *Rosenberger*—whether the First Amendment requires that an objecting student be able to opt out of funding a limited public forum in a university setting.

With the question now framed by the facts relating to the University of Wisconsin's actual collection and distribution of student fees, the Board of Regents submits that the compulsory payment of a fee to establish a limited public forum for student expression and to provide services to a significant number of students is not properly regarded as compelled speech subject to the *Abood* and *Keller* standards. Both authors of the dissents from the denial of en banc rehearing below noted that the panel had erred in using a compelled speech analysis rather than a forum creation analysis. 157 F.3d at 1128 (Wood, D.P., J. dissenting) (Pet.-Ap. 10a), 157 F.3d at 1126 (Rovner, J. dissenting) (Pet.-Ap. 4a). *See also Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1038 (CA9 1999) (the funding of the Oregon Student Public Interest Research Group Education Fund was

"not a true case of compelled association"—it was of the "utmost significance that the organizational speech at issue occurs in an academic setting").

In *Abood*, petitioners challenged the mandatory dues paid to an agency-shop union, about which the Court said: "[t]he designation of a union as exclusive representative carries with it great responsibilities." 431 U.S. at 221. In *Keller*, the challenged funding went to "an 'integrated bar'—an association of attorneys in which membership and dues are required as a condition of practicing law in a State." 496 U.S. at 5. In the present case, the Board of Regents is a governing body in a way not shared by the union in *Abood* nor the bar association in *Keller*. The Wisconsin Legislature has specifically authorized the collection of student activity fees by the Board of Regents, and has directed that primary responsibility for distributing such funds be delegated to the students, in accordance with the principle of "shared governance" (Stip. ¶ 2; Pet.-Ap. 101a).

No argument was made in *Abood* and *Keller* that the expressive activities of the union and bar association in any way constituted a forum. To the contrary, the salient feature of those cases was that only a single point of view was funded, with the speech represented as that of the union or bar association members. In contrast, the student fees collected by the University of Wisconsin-Madison fund many points of view on a viewpoint-neutral basis (Stip. ¶ 12; Pet.-Ap. 106a). There is neither representation nor perception that the organizations receiving funding at the University of Wisconsin reflect the views of the University or all students. The University itself is not advocating a particular point of view, and the required disclaimers are noted in the statement of facts. Respondents agree that the funded organizations are not creating the false impression that the "objectionable groups are speaking for" them (Plaintiffs' Reply Br. at 2 (W.D. Wis. filed Oct. 27, 1996), R. 42).

The imposition of a student fee, distributed to student organizations on a viewpoint-neutral basis to facilitate their expression, is fundamentally similar to the construction of a classroom, auditorium, university mall or other university facility available to student groups for meetings, rallies or speech. The "capacity of a group or individual 'to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.'" *Widmar*, 454 U.S. at 267 n.5, quoting *Healy*, 408 U.S. at 181-82. In *Rosenberger*, this Court specifically rejected the argument that "from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not." 515 U.S. at 835. This Court held that it followed from the holdings of cases such as *Widmar* and *Lamb's Chapel* that "a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers . . . the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall." *Rosenberger*, 515 U.S. at 843 (citations omitted). For student groups on the campus of a large public university, postage, copying and office supplies, are among "the customary media for communicating with the administration, faculty members, and other students." *Healy*, 408 U.S. at 181-82 (footnote omitted).

This Court has long recognized the importance of streets and other public places as the physical fora at which much First Amendment expression takes place. *See, e.g., Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997). For public universities, the use of physical facilities for speech and association has been recognized to create a designated or limited public forum for attending students. *Widmar*, 454 U.S. at 267. At times, the creation of a forum will result in speech with which we disagree; at time it will result in speech that is found

loathsome. *Cf. Nat. Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam). We know of no decision of this Court, however, which has recognized a First Amendment right to opt out of funding a forum. The creation of a *Rosenberger* forum furthers First Amendment values with only an incidental and universally-shared burden on students' beliefs. Dissenting students should have no greater right to opt out of supporting this limited public forum than they would have to opt out of sharing the costs of constructing an auditorium, classroom or other public space where ideas they object to might be expressed. The fundamental First Amendment response to individual sensitivities to ideas found objectionable has always been more speech not less. That respondents are adult students choosing to enroll at a large public university, where diverse and robust expression is to be desired, encouraged and expected, hardly makes this fundamental response less appropriate. If respondents do not like what the International Socialist Organization is saying, they should obtain funding for their own student group to advance their view of the truth. As noted in our statement of facts, several of respondents have done just that and are in fact members of RSOs receiving ASM funding.

That some of the speech occurring can be regarded as political does not change this conclusion. Given the status of political speech as the central concern of the First Amendment, it is appropriate for government to establish a forum for it to take place.

Paradoxically, it was the court of appeals' recognition of *Rosenberger*'s requirement of viewpoint neutrality in the distribution of resources for student expression which caused it to perceive a violation of individual liberty. The court stated:

> under *Rosenberger* it would seem that if the university opens up funding to private organizations it must fund not only the

> Socialists and the Greens, but the Republicans, the Democrats, the KKK, Nazis, and the skinheads; the Nation of Islam, the Christian Coalition, and Catholic, Protestant, Jewish, and Islamic organizations. To others, this engenders a "crisis of conscience." For example, when a Christian campus group sought an ASM operations grant, the Ten Percent Society opposed it, contending that it would be illegal and unconstitutional to fund the proselytizing and anti-homosexual advocacy of this Christian organization.

151 F.3d at 730 n.11 (Pet.-Ap. 40a). The court of appeals concluded that "[i]f the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights." *Id.*

The Regents submit that this imperative does not arise under the First Amendment. The First Amendment is not offended by requiring politically liberal homosexual students and conservative, Christian students alike to share equally in the costs of creating a forum for the expression of each other's and all other viewpoints at the University of Wisconsin.

Indeed, this Court has held that under certain circumstances the government may require individuals to provide access to private property where to do so results in a public forum. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that the First Amendment rights of the owner of a private shopping center were not infringed by California's decision to recognize public rights of expression and petition in shopping centers. *Id.* at 88. In analyzing whether the owner had a "First Amendment right not to be forced by the State to use his property as a forum for the speech of others," *id.* at 85 (footnote omitted), this Court specifically

noted: (1) that the shopping center was open to the public; (2) that the views expressed by members of the public were not likely to be identified as those of the owner; (3) that no specific message was being dictated by the State of California—that there was no danger of governmental discrimination concerning a particular message; and (4) that the owner could expressly disavow any connection with the message by posting signs. *Id.* at 87.

The forum funded by student fees at the University of Wisconsin is analogous to the "forum" the owner of the shopping center was compelled to allow: (1) the University has created a forum open to all Registered Student Organizations; (2) the respondent students have admitted that the views of the groups are not likely to be considered their individual views (Plaintiffs' Reply Br. at 2 (W.D. Wis.), R. 42); and the ASM requires a disclaimer that the views of the funded organization are not the views of the student government; (3) neither the Board of Regents nor the student government is dictating a specific message—the forum was stipulated to be "viewpoint-neutral;" and (4) respondents and other students are free to form their own student groups and receive the same funding to express their views or their disagreement with the views of any other student group. The court of appeals failed to recognize that whether speech is made on behalf of a dissenting individual is part of a determination of whether there is compelled speech in the first place. 151 F.3d at 732 (Pet.-Ap. 44a) ("The Regents next argue that because the organizations do not purport to speak for all students, the First Amendment is not violated. This is irrelevant. . . . It matters not whether a third party attributes the private organization's political and ideological views to the objecting student"). In *Pruneyard*, the public policy of opening shopping centers had been established by provision of the State's constitution. Similarly, here the Wisconsin Legislature has established that learning at the University of Wisconsin is to extend beyond the classroom (Wis. Stat. § 36.01(2)), and has provided that student fees in addition to tuition be spent on campus student

activities, with students having primary responsibility for distributing the fees under the system of shared governance (Wis. Stat. § 36.09(5)). Moreover, in the present case, there is a much smaller burden on rights of conscience where all students are charged the same amount of money to create a forum than potentially existed in *Pruneyard*, where the requirement to open one's property to expressive activities burdened only those few individuals owning shopping centers or similar properties.

Student government's distribution of a portion of the student fees to organizations providing "direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13, Pet-Ap. 106a), if it raises a compelled speech issue at all, also does not contravene the First Amendment. The collection of fees separate from tuition to provide student services is authorized by state statute. *See* Wis. Stat. § 36.09. As such, the expenditures are analogous to a state political subdivision's providing funding to private organizations for the provision of community services. It is not uncommon for such organizations to engage in some type of client advocacy. Nevertheless, as noted in our statement of facts, respondents' assertion that the only service the objected-to groups provide in this case consists of their political or ideological advocacy is not true; at least it is seriously disputed.

There is no recognized right to opt out of supporting government programs funded by general tax revenues on the basis of objections of conscience. *See, e.g., Lull v. C.I.R.*, 602 F.2d 1166 (CA4 1979) (rejecting religious objection to payment of taxes used to pay for war or war preparations), *cert. denied*, 444 U.S. 1014 (1980); and *Autenrieth v. Cullen*, 418 F.2d 586 (CA9 1969) (same), *cert. denied*, 397 U.S. 1036 (1970). Moreover, when government appropriates funds to promote its own message, it can generally determine the content. *See Rust*, 500 U.S. 173. Respondents' objections to funding for the service groups is largely an ideological

objection to having to support, through a system of general revenues, social welfare spending with which respondents do not agree. Whatever sympathy might be felt for this view as a matter of political ideology, funding service organizations whose purpose one does not endorse is not the equivalent under the First Amendment of compelling adherence to specific content or viewpoint. A student who is ideologically opposed to mass transit (for example, because of its perceived valuing of conformity and punctuality) would not have a constitutional right to opt out of paying the portion of the 1996-97 student fee used to provide Madison Metro bus passes to all students (J.A. 135). The same should be the case for respondents' objections to organizations like the Campus Women's Center, which addresses issues specific to women students such as gender discrimination, date rape and eating disorders, or the Madison AIDS Support Network, whose GSSF funding went to hiring additional staff to provide information about AIDS to students. Accordingly, respondents challenge to providing support for GSSF-funded service organizations should fail.

In sum, in this case, as in *Rosenberger*, the provision of funding to student groups to facilitate the expression of a broad spectrum of ideas involves "a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in" political or ideological views. 515 U.S. at 844. Respondents are not being compelled to speak or associate, and their challenge to providing general support to the creation of a limited public forum should be rejected.

II. THE CHALLENGED STUDENT FEES ARE CONSTITUTIONAL UNDER THE GERMANENESS TESTS ESTABLISHED IN *ABOOD*, *KELLER* AND *LEHNERT*.

As noted above, when the issue in this case was reserved in *Rosenberger*, both the majority opinion and Justice O'Connor's concurrence noted the possible application of *Abood* and *Keller*. The court of appeals attempted to decide this case based on a standard articulated in *Lehnert*, that had further applied the germaneness test of *Abood* and *Keller* to specific union expenditures. Because vibrant student speech is at the core of the University of Wisconsin's mission and because the provision of student services to a diverse student body is an essential University function, expressly authorized by the Wisconsin Legislature, if the germaneness test applies, the student activity fee at the University of Wisconsin-Madison should be upheld.

Abood established a "germaneness" test for determining whether an agency-shop union could spend dissenting members' dues for the expression of political views and the advancement of ideological causes. In *Abood*, this Court held that it did not violate the First Amendment to compel "fair share" contributions by non-union members to a public sector union: "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. This Court explained the boundaries of the First Amendment with respect to a union's expenditure of dues for political or ideological advocacy:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as

> collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.
>
> There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.

Id. at 235-36 (footnote omitted).

In *Keller*, this Court reaffirmed that compulsory bar dues do not impinge upon freedom of association rights, as it had held in *Lathrop v. Donohue*, 367 U.S. 820 (1961), but went on to extend *Abood's* germaneness standard to the funding of ideological and political expression made on behalf of all members. *Keller*, 496 U.S. at 13-14.

In the present case, the court of appeals attempted to follow the principles of *Abood* and *Keller* by applying the three-prong test of whether union expenditures violate objecting employees' First Amendment rights stated in *Lehnert*. Under *Lehnert*'s three-prong test, the expenditure must (1) be "germane to collective bargaining;" (2) be "justified by the government's vital policy interest in labor peace and avoiding 'free riders;'" and (3) "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 151 F.3d at 724, citing *Lehnert*, 500 U.S. at 519 (Pet.-Ap. 26a).

As discussed in the previous section, *Abood*, *Keller* and *Lehnert* do not provide the appropriate standard for assessing a public university's collection and distribution of student fees under the circumstances of this case. Here, there is no contention that the funded groups are speaking on behalf of respondents. In contrast, the unions and bar associations in *Abood, Keller and Lehnert* were taking positions and expressing views on behalf of all covered individuals. Here, there is no single organization to which all students must belong. In contrast, those cases involved agency-shop unions and an integrated bar. Here, there is funding of services for substantial segments of the student population and the creation of a *Rosenberger* forum through the viewpoint-neutral funding of diverse student expression. In those cases there was advocacy of only one point of view.

However, even if *Abood, Keller* and *Lehnert* control the disposition of this case, these same principled differences between the situations presented in those cases and the one presented here, combined with the unique role of a public university, both in encouraging student expression and in providing services to a diverse student body, lead to the conclusion that the funded activities are germane and that the student activity fee should therefore be upheld.

As previously discussed, this Court's precedent has long recognized the unique role of universities in encouraging expression of a wide range of opinions, including political opinions, and offering a "marketplace" of ideas. Similarly, the circuit courts that have addressed the issue of student activity fee funding have considered the creation of a forum for student expression as central to a university's role, even in those cases where the funding of a particular group was not upheld. *See, e.g., Galda v. Rutgers*, 772 F.2d 1060, 1064 (CA3 1985) (concluding that the New Jersey Public Interest Research Group's educational benefits were incidental to the organization's primarily political and ideological purpose, but distinguishing "the student activity fee [that] is used to

subsidize a variety of student groups . . . that . . . can be 'perceived broadly as providing a 'forum' for a diverse range of opinion.'"); *Carroll v. Blinken*, 42 F.3d 122, 128 (CA2 1994) (holding that student activity fees could be used for activities that foster a "marketplace of ideas" on the SUNY Albany campus); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (CA5 1992) (finding that a university's educational goals justified the subsidy of a University-sponsored newspaper because it "allows students to have first-hand journalism experience difficult to obtain otherwise" and because it "creates a forum for public discussion of University-related issues that can 'stimulate uninhibited and vigorous discussion on matters of campus and public concern.'"); *Kania v. Fordham*, 702 F.2d 475, 477 (CA4 1983) (concluding that a university's partial funding of a student newspaper through mandatory student fees was constitutional because it served "the state's legitimate interest in creating the richest possible educational environment at the University and, in its role as a forum for the expression of differing viewpoints, is a vital instrument of the University's 'marketplace of ideas.'"); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 153 (D. Neb. 1973) (upholding mandatory student activity fees to fund student newspaper, student association and speakers program—"a university is not constitutionally prohibited from financing through mandatory student fees programs which provide a forum for expression of opinion, be that expression oral or written"), *aff'd mem.*, 478 F.2d 1407 (CA8 1973); and *Rounds*, 166 F.3d at 1040 n.5 (upholding funding of Oregon Student PIRG and explicitly rejecting the Seventh Circuit's holding in this case: "[t]o the extent that *Southworth* holds that a public university may not constitutionally establish and fund a limited public forum for the expression of diverse viewpoints, we respectfully disagree . . .").

Similar conclusions have been reached by state supreme courts that have considered the issue. *See Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973)

(mandatory fee funding constituted a "monetary platform" for introducing spectrum of ideas into campus, students had not shown that university prevented them from presenting their own viewpoints); *Good v. Associated Students of Univ. of Washington*, 86 Wash.2d 94, 542 P.2d 762 (1975) (mandatory fee funding held constitutional when balanced against university's purpose of posing a broad spectrum of ideas, provided expenditures were within statutory authorization); *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d 568 (1973) (mandatory fees to fund student newspaper, student government and speaker's program held to be part of educational process; so long as many viewpoints were expressed, there was no constitutional violation); *but cf. Smith v. Regents of University of Cal.*, 844 P.2d 500 (public forum cases offer little assistance, no student group claims to be a public forum; when the educational benefits a student group offers become incidental to the group's primary objective of advancing its own political and ideological interests it cannot be funded with compulsory fees).

Consistent with this Court's precedent regarding the centrality of wide-ranging debate and inquiry to the university setting, and consistent with the decisions of lower federal courts and state supreme courts that the creation of a limited public forum for the expression by student organizations furthers a university's function, is the Wisconsin Legislature's definition of the University of Wisconsin's mission. The Wisconsin Legislature has specifically authorized the collection of student activity fees by the Board of Regents, directing that primary responsibility for distributing such funds be delegated to the students, in accordance with the principle of "shared governance," Wis. Stat. § 36.09(5). The Legislature has directed that students should formulate policies on "student life, services and interests" and that students should have "responsibility for the disposition of those student fees which constitute substantial support for campus student activities." Wis. Stat. § 36.09(5). The Wisconsin Legislature has also defined as part of the University of Wisconsin's mission the

extension of the application of knowledge beyond the classroom, even beyond the campuses. Wis. Stat. § 36.01(2).

The position that the University of Wisconsin cannot compel student funding of student services or of a non-spatial forum for expression by student groups (and the corollary that the University can only fund the services and the forum either directly or through voluntary contributions of non-objecting students (151 F.3d. at 730 n.11; Pet.-Ap. 40a)) fails to take into account the University's fundamental educational purpose. The officials appointed by the Governor of the State of Wisconsin to carry out the University's mission, namely the petitioners here, and the University chancellors and deans employed by them, have determined that the funding of student services and the provision of funding to student groups to facilitate their expression are essential to the University's attainment of these educational goals. The facts here are like those in *Rosenberger* where this Court said—"[t]he exaction here . . . is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." 515 U.S. at 840. Part of a university's educational mission is to enlighten students to opposing views so they can learn to "think for themselves and to separate the 'wheat from the chaff.'" 157 F.3d at 1125 (Rovner, J. dissenting) (Pet.-Ap. 3a). Exposure to diverse and competing views is educational in and of itself and teaches tolerance. The Dean of the University of Wisconsin-Madison attested to the importance of RSOs, going so far as to recognize their offering of a "second curriculum" (Stip. ¶ 25, Attach. h; J.A. 253). In contrast with the Board of Regents' assessment, respondents would rather objecting students silence each other than learn from constructive discussion of ideas with which they disagree. This Court has stated that where possible, "'the remedy to be applied is more speech, not enforced silence.'" *See Texas v. Johnson*, 491 U.S. 397, 419 (1989), citing *Whitney v. People of State of California*, 274 U.S. 357, 377 (1927) (Brandies, J. concurring).

The vibrancy of campus debate and expression that results when over 100 autonomous student organizations are able to receive small operations grants to cover the costs of printing and mailing newsletters and fliers or somewhat larger events grants to sponsor outside speakers, host exhibitions, show films or present theater performances (this is precisely the speech to which respondents object), is by no means the only benefit of the challenged fee system. The students who participate in student organizations are given the opportunity to write, print and distribute newsletters, not for credit, but out of whatever intrinsic interest a group's focus has for them. As broad-ranging as the University's academic and research programs are, there are points of view that are not the subject of classroom discussions or refereed journal articles. Moreover, there is a difference between hearing a viewpoint expressed in a lecture hall and stating it for oneself in the newsletter of a student organization.

Respondent students offered no evidence to refute the academic judgment of the Board of Regents that the provision of services to a diverse student body and the creation of a limited public forum for the expression of the full range of ideas of interest to students is not merely germane, but central to the University's educational mission.[14] The district court specifically found that the University had a "compelling interest in promoting the free exchange of ideas by subsidizing the political and ideological student organizations" (Pet.-Ap. 95a). Respondents' arguments, like the district court and court of appeals' rulings, rely on the premise that the educational benefits of the content of the expressive activities of certain

---

[14] In fact, respondent Bannach agreed with the Board of Regents that there is "an educational value to students in being exposed to a great many ideas, even those with which they don't agree at the University" and "an educational value in providing students with the opportunity to organize student groups and to run them on their own" (Bannach Dep. at 63, R. 21.)

specific student groups are outweighed by their political or ideological purpose. Thus, the district court, relying on the California Supreme Court's analysis in *Smith v. Regents of the University of Cal.*, held the mandatory student fees unconstitutional when used to provide funding to groups "whose educational benefits to the UW-Madison campus are incidental to [their] political and ideological activities" (Pet.-Ap. 93a). The fundamental error of this position is that it looks to the expression of each particular student group, as though examining the syllabus of a particular course, instead of focusing on the fact that it is the expression of multiplicity of ideas and the opportunities afforded students to engage in that expression, which is germane. What any individual student group chooses to speak on is not the educational focus of the University of Wisconsin. In the context of a union or bar association it makes sense to examine the organization's specific expression. It does not where the "organization" collecting the fees is not speaking, but instead is offering funding to promote opportunities for expression no matter the point of view.

Respondent students' challenge to the Board's determination of what furthers the University's educational mission would thrust courts into discretionary academic decisions, forcing them to engage in student organization-by-student organization analyses of educational benefits. This would be contrary to this Court's admonitions that academic decisions should be left to those charged with overseeing a university's functions. *See, e.g., Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."). This Court's statement in *Rosenberger* of the risks of censorship inherent in a system that attempts to distinguish between student expression based on the content of the expression, applies with equal force to the system underlying the district court's and court of appeals' rulings:

> Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a [political] content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between [student publications which may be funded and publications which may not be funded]. . . . That eventually raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of [political] orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression.

515 U.S. at 844-45.

Respondents purported distinction as to what is educational is to accept whatever is taught in courses—*i.e.*, whatever expression is funded by tuition rather than fees. Respondent Southworth candidly stated at his deposition that if the same information were given in a women's studies course and in a pamphlet by the Ten Percent Society, he would not oppose the former, but he would oppose the latter (Southworth Dep. at 23-24, R. 23). In sum, respondents would deny the possibility of any forum for debate since presumably all points of view would have detractors producing an administrative burden that would be unsustainable.

What is occurring in this case is very unlike *Abood*, *Keller* and *Lehnert*, and if occurring there might well have been sustained. The use of mandatory fees to fund services

to "significant numbers of UW-Madison students" (Stip. ¶ 13; Pet.-Ap. 106a), is analogous to a union using member dues to provide disability counseling or a bar association's funding an association for women attorneys. The other principal use of the fees is to provide resources for student expression on a viewpoint-neutral basis, an activity which is integral to a university's role. It would be unusual for a union or bar association to provide small grants to members to facilitate their own expression. But doing so would involve a burdening of conscience for dissenting members that would hardly be comparable to an organization's use of member dues to fund only its own political or ideological speech. The difference between a university's function and that of a labor union or professional association renders the financing of diverse public expression on a viewpoint-neutral basis wholly proper—that is to say, a germane method of carrying out the University's essential function of education. Accordingly, if the proper standard is the germaneness test of *Abood*, *Keller* and *Lehnert*, then the student fees challenged here should be upheld.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

**Counsel of Record*

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In The
Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, *et al.*,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

DANIEL KELLY
REINHART, BOERNER, VAN DEUREN,
NORRIS, AND RIESELBACH
1000 North Water St.
Milwaukee, Wisconsin 53202
(414) 298-8284

JORDAN W. LORENCE
Counsel of Record
NORTHSTAR LEGAL CENTER
P.O. Box 2074
Fairfax, VA 22031
(703) 359-8619

Counsel for Respondents

WILSON-EPES PRINTING CO. ◆ WASHINGTON, D.C. ◆ 1-800-[illegible]

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QUESTION PRESENTED

Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.

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STATEMENT OF THE CASE

The University Requires Students to Pay the Fee

The Board of Regents requires all students enrolled at the University of Wisconsin-Madison ("University") to pay a mandatory fee, called the "segregated fee." J.A. 9. The University will not allow students to graduate or receive their grade transcripts if they refuse to pay the mandatory fee. Answer ¶ 9. Students cannot receive a refund of the portion of the fee that funds campus organizations the students find objectionable. Answer ¶ 1. Full-time students attending the University during the first semester 1995-96 school year were required to pay a fee of $331.50. J.A. 10.

The segregated fee has two parts, the allocable and the nonallocable, and many subparts. The Board of Regents prohibits the student government from controlling or directing the nonallocable fee. J.A. 13-14. The student government only directs the allocable portion of the mandatory fee. *Id.*

The students in this case ("students") objected to the requirement that they fund private campus groups. They objected specifically to funding 18 student organizations because of their opposition to the groups' political and ideological advocacy:

Amnesty International
Campus Women's Center
Community Action on Latin America
Internationalist Socialist Organization
La Colectiva de Aztlán
Lesbian, Gay Bisexual, Campus Center
Madison Treaty Rights Support Group
Madison AIDS Support Network

MADPAC
Militant Student Union
National Organization for Women (student chapter)
Progressive Student Network
Student Labor Action Coalition
Student Solidarity
Ten Percent Society
United States Student Organization
UW Greens
WISPIRG (Wisconsin Public Interest Research Group)

The student government funds these groups through three categories of the allocable fee: the General Student Services Fund ("GSSF"), the budget of the Associated Students of Madison ("ASM")(the student government) and the WISPIRG fund. J.A. 133-152.

The students have not objected to funding such things as the student health service (J.A. 133 and 135), the child care tuition assistance program (J.A. 134), the campus shuttle bus (J.A. 135), or the study center (called GUTS). J.A. 16.

The Fee Funds Less Than One-Third of Campus Groups

Most student groups at the University - at least 71% - receive no student fee money. In the 1995-96 school year, there were 623 Registered Student Groups at the University. J.A. 255. The total number of student organizations that received any fee money at all was 183, which includes some groups that are double-counted. See J.A. 16-17 (GSSF allocations) and J.A. 137-152 (ASM grants). This means that 29% of the registered student groups received funding from the fee and 71% of the student groups did not even apply for funding and operated successfully on campus without using mandatory fee money.

The segregated fee money funds the general overhead expenses of each organization receiving funding. J.A. 250-51.

Most of the campus organizations that receive mandatory fee money received ASM grants. There are four types of ASM grants. During the 1995-96 school year, ASM awarded 81 operations grants, ranging from $100.00 to $863.00, with an average grant of $382.00, J.A. 143-150; 39 last minute operations grants totaling $3,954.00, ranging from $40.00 to $175.00, with an average grant of $101.00, J.A. 150-152; 57 event grants ranging from $150.00 to $7,000.00, with an average grant of $1,279.00, J.A. 139-43 and six travel grants ranging from $150 to $400, with an average grant of $255.00. J.A. 138.

A select group of 17 campus organizations received the much larger GSSF grants, ranging from $6,905.00 to $481,673.00 each for providing services to students on campus. J.A. 16-17 and 137. Some of these were legitimate services containing no component of advocacy, such as the shuttle bus and the study center. However, the only "service" provided by many GSSF-funded groups was advocating their viewpoints to others and urging them to join their causes.

The Funded Campus Organizations Engage in Political and Ideological Advocacy

WISPIRG

The Wisconsin Public Interest Research Group (WISPIRG) received $49,500.00 from the segregated fee during the 1995-96 school year. J.A. 40 and 65. WISPIRG receives $45,000 from a direct referendum that students approved in 1993, and another $4,500 from the GSSF fee process. *Id.* There are two organizations called "WISPIRG." J.A. 171. Student WISPIRG

is the one that receives student fee money and engages in substantial political and ideological advocacy.

Student WISPIRG published candidate scorecards

The Student WISPIRG published a voters' guide called "WISPIRG's Green Voter Guide" for candidates running for the U.S. House seat, Wisconsin Second District. J.A. 76-79. Student WISPIRG attached the voter guide to its GSSF grant application in 1995-96. J.A. 65. The voters' guide gave the candidates' stands on various pieces of federal legislation, such as the National Bottle Bill (H.R. 1818 and S.818), the moratorium on new solid waste incinerators until the year 2000 (H.R. 2488) and 14 other issues. *Id.*

Student WISPIRG engaged in lobbying

In its application for University funding, Student WISPIRG boasted that "WISPIRG-generated letters, postcards, phone calls and lobbying convinced U.S. Representative Scott Klug to co-sponsor H.R. 188, a bill designed to shift one billion dollars from fossil fuel research to renewable energy research." J.A. 350. Student WISPIRG also said that it worked to support the Endangered Species Act and the National Bottle Bill introduced in Congress. J.A. 351-52.

The newsletter of Student WISPIRG repeatedly published articles chronicling its lobbying efforts at the Wisconsin Legislature on "the impacts of mining in Wisconsin." J.A. 70. Student WISPIRG also stated that it "worked with state legislators, environmental groups and other concerned citizens in an effort to promote state legislation to reform outdated mining laws and bring mining standards up to the level of other industries." J.A. 352 (emphasis added).

WISPIRG, the UW Greens and others sponsored Earth Week 1995. J.A. 21-22. In one Earth Week event, WISPIRG and the UW Greens led a march to the State Capitol to protest Governor Tommy Thompson's spending priorities by "composting" the budget, rather than using the environmentally unfriendly method of burning it. *Id.*

Student WISPIRG funded political activism by U.S. PIRG with student fee money

Student WISPIRG annually gives part of its University fee money to its parent organization, U.S. PIRG, giving $2,500 to U.S. PIRG in 1995-96. J.A. 66. WISPIRG defined U.S. PIRG as "[t]he national advocacy and research branch of the state PIRG's." *Id.* WISPIRG stated that U.S. PIRG's "[p]rofessional staff represents students in the U.S. Congress on issues such as the environment, consumer protection, and democracy." *Id.*

U.S. PIRG published extensive candidate evaluations in its voters' guide. J.A. 80-91. The voters' guide listed whether members of Congress supported or opposed the "public interest vote" on specific pieces of legislation. *Id.* Student WISPIRG used this information in its own voters' guide for Wisconsin congressional candidates. J.A. 79.

Student WISPIRG also contributed $7,828.00 of its student fee money to "PIRG Development." J.A. 66. This money pays for "national staff backup," and "[n]ational campus materials such as ... grassroots organizing manuals." *Id.* Thus, Student WISPIRG sent $10,328.00 of its $49,500 grant to national PIRG organizations for their activism.

Campus Women's Center

The Campus Women's Center received $34,200.00 from the

segregated fee during the 1995-96 school year. J.A. 24. The Campus Women's Center publishes a newsletter, called, "The Source." In its February/March 1996 issue, the editor, Jennifer Axen, wrote that "I am proud to publish the words of those who have refused to relax their integrity. The women who contributed to this issue of The Source, stand as shining examples of those who refuse to soft-pedal [sic] their voices - even when traversing the most unreceptive ground.♀" J.A. 94.

Campus Women's Center lobbied against pro-life bill

One of the articles the Campus Women's Center "was proud to publish" in that Feb./March 1996 issue, opposed Wisconsin Assembly Bill 441, the "Informed Consent Bill" on abortion:

> We must act now to block the bill. You can obtain a copy of the bill at the Legislative Reference Bureau. Familiarize yourself with its contents and get prepared to defend women's rights to reproductive choice when the bill hits the Senate floor in March. For more information or to find how you can become further involved, contact Jennifer at the Campus Women's Center: 262-8093. ♀

Cert. Pet. at 19a; J.A. 96. Although the Source carried a boilerplate disclaimer, ("Opinions expressed in The Source are those of the contributors and do not necessarily reflect those of the collective." *Id.*), the Campus Women's Center invited readers to call its phone number (J.A. 93) "to find out how you can become further involved" in the lobbying effort against the informed consent bill. The Campus Women's Center also published articles opposing legislation reforming welfare, changing family leave laws, banning same-sex marriage and feticide; and supporting legislation limiting protests at abortion

clinics. J.A. 97-105.

Campus Women's Center sponsored pro-choice art

The Campus Women's Center co-sponsored a multi-media presentation called "Wake Up Little Susie/Warnings." J.A. 335. "Wake Up Little Susie" showed the "extreme danger" women suffered without legalized abortion before *Roe v. Wade*. J.A. 340. The second presentation, "Warnings," "is the work of a Jewish feminist enraged by anti-choice propaganda equating abortion with the Holocaust and abortion-rights activists with Nazis." J.A. 24-5 and 343.

Campus Women's Center cosponsored gay film festival

The Campus Women's Center cosponsored the Third Annual Gay and Lesbian Film Festival (J.A. 25) with two other fee-funded groups, the Lesbian Gay Bisexual Campus Center and the Ten Percent Society. J.A. 107. The Festival presented various homosexual films, including one in which "[m]ilitant anti-porn feminist Bernice-Be-Good battles it out with a band of proud sex workers and their pussy-powered Kung Fu," *id.*, and "Viva Knival shows off her sex-positive attitude with a host of Fischer Price toys ..." *Id.*

UW Greens

The UW Greens received $6,905.00 from the segregated fee during the 1995-96 school year. J.A. 26.

UW Greens supported Ralph Nader for president and lobbied the Wisconsin Legislature

During the 1996 presidential campaign, the UW Greens distributed from their office campaign literature supporting

Ralph Nader's bid for President on the Green Party ticket, as well as general information about the Green Party USA, a political party. Cert. Pet. 18a. Scott Southworth obtained the campaign materials at the UW Greens literature box by its office. Second Affidavit of Scott Harold Southworth, District Court number 47 (referenced at J.A. 5). The UW Greens lobbied the state legislature in favor of three Assembly bills to limit mining in the state. J.A. 26. The UW Greens also joined WISPIRG to protest the Governor's budget priorities by marching to the state capitol and "composting" his budget. *Id.*

The UW Greens also opposed use of Bovine Growth Hormone in milk and dairy products, urged people to boycott Shell Oil and embargo Nigerian exports because of Nigeria's alleged environmental and human rights abuses, and opposed "Structural Adjustment Programs" imposed by the World Bank on poor Third World nations. *Id.*

International Socialist Organization

During the 1995-96 school year, the International Socialist Organization received an operations grant of $350.00. J.A. 27.

The International Socialist Organization promotes socialism through various debates and rallies. The organization discussed the alleged advantages of socialism over capitalism on its Internet website (J.A. 27):

> Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown.

The International Socialist Organization opposed the Republicans' Contract with America, supported affirmative action, and opposed "racism, sexism and homophobia." *Id.*

Socialists disrupt church service

On April 12, 1995, the International Socialist Organization joined with others to disrupt a church service at a black church in Madison because it sponsored two speakers who oppose homosexuality. J.A. 126-129. About 400-500 demonstrators massed outside of the church, holding signs, chanting, blowing whistles, beating metal garbage can lids, etc. *Id.* The protestors chanted "Queer Mob Rule," "Two, Four, Six, Eight, We Don't Want Your Christian Hate," and "Bring Back The Lions." *Id.*

Ten Percent Society

During the 1995-96 school year, the Ten Percent Society received an ASM operations grant of $550.00. J.A. 27. The Ten Percent Society is a pro-homosexual group that works "to ensure that LGB's [lesbians, gays, and bisexuals] have a study environment free of homophobia and harassment. We envision a day when all barriers between LGB's and straight people have fallen and we can all be ourselves without fear of verbal abuse." J.A. 27-28.

Political advocacy

The Ten Percent Society has "also been active in the political arena as necessary. In the past we have struggled against homophobia in the military and on campus, we have held candidate forums for student areas, and we have gone head to head with the administration as is becoming necessary again. In the future we will continue are [sic, "our"] newly begun attempt to get domestic partner insurance by networking with as many students as are willing." J.A. 28.

The Ten Percent Society supports same-sex marriage

and opposed attempts in the Wisconsin Legislature to ban it. Appellees' App., Seventh Cir. at 154-55. The organization also condemned the Student Health Insurance Plan because it does not extend coverage to the unmarried homosexual partners of students. J.A. 355; Appellees' App., Seventh Circuit at 159-61.

Support for "coming out"

The Ten Percent Society cosponsored a Coming Out Series in October 1996 with another fee funded organization, the Lesbian, Gay, Bisexual Campus Center. The Coming Out Series was a "celebration of LGBT [lesbian, gay, bisexual, transgender] pride at the University of Wisconsin at Madison." J.A. 114. The Ten Percent Society sponsored a similar "Out and About Conference" in April 1995, which included a speech by Ann Northrop, described as the "dyke activist from hell." Appellees' App., Seventh Circuit at 153.

Opposition to evangelical Christianity

The Ten Percent Society opposed the request by an evangelical Christian campus group, Chi Alpha, for an ASM operations grant. J.A. 130-31. Chi Alpha is affiliated with the Assemblies of God Church. The Ten Percent Society condemned Chi Alpha as a "radical right-wing fundimentalist [sic] organization," J.A. 130, and argued that it was illegal and unconstitutional to fund a group that opposes homosexuality. *Id.* The Ten Percent Society lobbied the student government to reverse itself and deny funding to Chi Alpha. J.A. 132.

Other student organizations

The students also submitted evidence of other campus groups funded by the mandatory fee that engaged in political or ideological advocacy the students found objectionable:

Amnesty International J.A. 322-24.
Community Action on Latin America J.A. 30-31; 329-32.
La Colectiva Cultura de Aztlán J.A. 314-17.
Lesbian, Gay Bisexual Campus Center J.A. 22-24; 106-21.
Madison AIDS Support Network Appellees App., Seventh Circuit, 119-20.
MADPAC J.A. 33; 320-21.
Madison Treaty Rights Support Group J.A. 33-34; 318-19.
Militant Student Union J.A. 308-09.
National Organization for Women (student chapter) J.A. 33; 325-26.
Progressive Student Network J.A. 28-29; 357-58.
Student Labor Action Coalition J.A. 31-32; 310-11.
Student Solidarity J.A. 32; 312-13.
United States Student Association Appellees App., Seventh Circuit, 188-191.

The University does not dispute most of the evidence the students submitted of the political and ideological activism. engaged in by the funded campus organizations, J.A. 21-34 (statement of uncontested facts). However, the University now argues that the courts below have relied partially on inaccurate evidence about what the funded campus organizations did.

Both sides submitted this case to the District Court on cross motions for summary judgment. J.A. 4-5; Petitioners' Brief at 5. The University did not argue that there were genuine disputes over material facts, as required by Fed. R. Civ. P. 56. The District Court granted the student-plaintiffs' motion for summary judgment. Cert. Pet. at 77a-99a. The University appealed to the Seventh Circuit and petitioned this Court, but did not raise the issue that the District Court had wrongly

granted summary judgment because there were genuine disputes about material facts.

It is odd that the University now claims factual inaccuracies concerning the activities of the campus groups, because it does not make any difference in the resolution of the substantive merits of this case. Under the University's theory of the First Amendment, campus groups may use mandatory fee money for just about anything "educational," including lobbying the legislature, publishing voter guides on candidates, handing out campaign literature and more.

The student-respondents have not mischaracterized the evidence of the political and ideological activities of the funded organizations. The lower courts were not persuaded by the University's evidence of bare denials by the leaders of the funded groups offered in their affidavits, in light of the overwhelming evidence of their advocacy and activism. The University's failure to raise this issue about supposed disputed facts in the lower courts, combined with the irrelevancy of these factual disputes, makes the University's point meritless.

The Objecting Students

Three law students enrolled at the University of Wisconsin-Madison's law school filed the original complaint. Other students joined the lawsuit as the original plaintiffs graduated. J.A. 3. All of the students described themselves as Christians and as holding conservative political beliefs. J.A. 20-21.

These students believe that all students have the right to express their opinion at the University by distributing literature on campus, renting rooms at the University for speeches, lobbying the Wisconsin Legislature and the Congress, supporting and opposing political candidates, conducting

protest rallies, etc. J.A. 21. They disagree with the views expressed by some campus groups funded by the segregated fee. They believe that students should be able to attend the University without the Board of Regents requiring them to fund private campus groups that express views they oppose. *Id.*

SUMMARY OF ARGUMENT

The analysis of the University's mandatory fee system must begin with the First Amendment right not to speak. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). Government cannot compel individuals to speak or to fund the advocacy of others. The University infringes on the students' constitutional rights by compelling them to fund the political and ideological advocacy of private campus groups the students would not fund voluntarily. The University must show a compelling state interest implemented by the least restrictive means to justify the compelled funding.

The University fails the compelling state interest test because the mandatory fee is not necessary to encourage robust debate by campus organizations. Over 70% of the student groups on campus receive no funds from the mandatory fee. The University substitutes its judgment for the individual students' judgment on what private groups to support.

The existence of a nonspatial forum of money as in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) does not decide this case. *Rosenberger* addresses how student fees are distributed, and coerced fee cases like *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) address how student fee money is collected. The Seventh Circuit's judgment should be affirmed.

I.

THE FIRST AMENDMENT PROTECTS A PERSON'S RIGHT NOT TO SPEAK AND PROHIBITS THE GOVERNMENT FROM COMPELLING INDIVIDUALS TO FUND ADVOCACY BY PRIVATE GROUPS

A. "No Coerced Funding of Others' Advocacy" Is A Basic Principle Of The First Amendment.

The analysis of the University's mandatory fee system must begin with the fundamental First Amendment principle that a person has a right not to speak. Government cannot compel individuals to speak or to fund the advocacy of others.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995), this Court stated that "[s]ince all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." This echoes the earlier statement by Justice Brennan writing for the Court in *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988), that "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *See also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("[I]nvoluntary affirmation c[an] be commanded only on even more immediate and urgent grounds than silence.")

This Court has applied this principle to prohibit the government from forcing individuals to convey messages against their will. In *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), this Court struck down a California state requirement that a utility company include an unwanted flyer by a consumer activist group in its billing envelopes. In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court extended the principle to exempt objectors from displaying the New Hampshire state motto on their car licenses. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court invalidated a Florida law requiring newspapers to provide space for response by political candidates criticized by the newspaper.

The government can also violate peoples' First Amendment right not to speak by forcing them to contribute financially to private advocacy groups. This Court applied this First Amendment principle to compulsory union dues in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and ruled that the government's requirement compelling teachers to contribute to the union's political advocacy violated the teachers' First Amendment rights when the advocacy was unrelated to collective bargaining. *Abood*, 431 U.S. at 234-35.

Abood traced the foundation of the right against compelled funding to the general right of conscience that undergirds the entire First Amendment:

> For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society, one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Id. This Court has reaffirmed the *Abood* rationale in *Chicago*

Teachers Union v. Hudson, 475 U.S. 292 (1986), and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

This Court also extended the principle of no compelled funding of others' advocacy to mandatory bar dues in *Keller v. State Bar of California*, 496 U.S. 1 (1990). In *Keller*, this Court found unconstitutional the rule that attorneys contribute to the State Bar of California for its lobbying efforts at the legislature on political matters unrelated to "regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13.

The *Abood-Keller* line of cases root the principle of "no compelled funding of others' advocacy" in the writings of Thomas Jefferson and James Madison surrounding the legislative battle against Virginia's efforts to compel its citizens to fund the religious teachers of their choice, and the ultimate defeat of that compelled funding effort by the passage of Virginia Bill for Religious Liberty.

Patrick Henry in 1784 introduced "A Bill Establishing a Provision for the Teachers of the Christian Religion," which proposed that Virginians be forced to give money to support "a Christian teacher" but that each individual taxpayer could decide which "Christian teacher" to support with his tax money. *See Everson v. Board of Education*, 330 U.S. 1, 73 (1947); *Flast v. Cohen*, 392 U.S. 83, 106 (1968); *Flores v. City of Boerne*, 521 U.S. 507, 560 (1997) (O'Connor, J., dissenting). Although the Virginia Legislature had disestablished the Anglican Church in 1776, the debate continued whether the state could compel individuals to fund a religious teacher of their choosing. *Id.*

James Madison wrote the Memorial and Remonstrance Against Religious Assessments to oppose this bill, stating:

> the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]

2 The Writings of James Madison 186 (Hunt ed. 1901), quoted in *Everson*, 330 U.S. at 65-66.

The Virginia Legislature failed to pass the bill compelling funding of Christian teachers and instead passed Thomas Jefferson's Virginia Bill for Religious Liberty. *See Everson*, 330 U.S. at 11. Jefferson's bill codified Madison's sentiments from the Memorial and Remonstrance. Jefferson included this oft-quoted statement in the Bill:

> [T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical...

Virginia Bill for Religious Liberty, quoted in *Everson*, 330 U.S. at 13.

This Court has used Madison's Memorial and Remonstrance to help interpret the entire First Amendment, including the Free Speech Clause. This controversy greatly influenced Madison's drafting of the First Amendment in Congress several years later. *Everson*, 330 U.S. at 11. In *Abood*, this Court referenced both Madison's "three pence" quote and Jefferson's "sinful and tyrannical" quote as authority to decide the compelled union dues question. *Abood*, 431 U.S. at 234 n.31. This Court also referenced these Madison and Jefferson quotes in *Keller*, 496 U.S. at 10; *Hudson*, 475 U.S. at 305 and *McGowan v. Maryland*, 366 U.S. 420, 465 (1961).

Madison and Jefferson opposed the compelled funding so vigorously because they understood that those controlling the government will tend to misuse its power to sustain their authority. Rulers can further their hegemony by forcing their citizens to fund those espousing the prevailing orthodoxies, either religious or secular. In order to guard the individual's right of conscience from government infringement, the First Amendment broadly prohibits government efforts to force unwilling citizens to contribute to the private speech of others.

B. The University Violates The Principle Of "No Compelled Funding" With Its Rule Mandating The Fee.

The University violates this foundational First Amendment principle by forcing students to contribute to a fund that gives money to various campus groups in order to further their advocacy. The Board of Regents requires all full-time students at the University to pay a mandatory fee each semester. JA-9. Students will not graduate or receive their grade transcripts if they refuse to pay the mandatory fee. Answer, ¶ 9. There is no way that students may be excused from paying the portion of the fee that funds campus groups that engage in political or ideological advocacy with which they disagree. Answer, ¶ 1.

In *Abood,* the dissenting teachers who objected to paying the mandatory union dues stated a violation of the First Amendment because the "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood,* 431 U.S. at 234. Here the Board of Regents conditions a student's participation in a significant state benefit -- attendance and graduation from the state university -- on paying a fee to fund the political and ideological advocacy of private campus groups. The record is replete with examples of this advocacy by the funded campus organizations. A student who

withholds payment of the segregated fee may not graduate or receive his grade transcript, greatly hampering the student's ability to transfer to another school, seek employment, etc. Therefore, the University's compulsory fee infringes on the students' First Amendment rights.

II.

THIS COURT SHOULD USE THE COMPELLING STATE INTEREST TEST TO ANALYZE THIS CASE

A. First Amendment Violations Require Strict Scrutiny.

When the government infringes on a person's First Amendment rights, "[i]t must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). This test applies to universities. *Widmar* applied it to the University of Missouri-Kansas City's content-based exclusion of religious speakers. The compelling state interest test is the one this Court normally applies in cases involving violations of the freedom of speech, including coerced speech cases. *See, e.g., Riley v. National Federation of the Blind,* 487 U.S. at 800; *Pacific Gas & Electric Co. v. Public Utilities Commission,* 475 U.S. at 17; *Wooley v. Maynard,* 430 U.S. at 716.

B. A Compelling State Interest Must Exist To Trigger Application Of The Germaneness Test.

In the mandatory fee cases such as *Abood* and *Keller,* this Court has not stated explicitly that it was using the compelling state interest test, although that was implicitly the test used in those cases. *Abood* and *Keller* refer to a "germaneness" test.

See Abood, 431 U.S. at 235; *Keller*, 496 U.S. at 13. In *Hudson*, this Court indicated that the germaneness test is a version of the compelling state interest test:

> Infringements on freedom of association may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Hudson, 475 U.S. at 303 n.11 (internal quotation marks omitted).

The compelled funding is "germane" if it pays for the expenses related to the compelling state interest. Courts use the germaneness test to determine which expenses are chargeable to those forced to pay as essential to furthering the compelling state interest identified in the particular case, and which expenses are not chargeable to those required to pay. *See, e.g. Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991) (distinguishing between costs chargeable to all workers as collective bargaining costs and costs which are not).

Some of the lower courts addressing mandatory student fee cases have interpreted *Abood* and *Keller* as directing them to use the compelling state interest test. *See, e.g., Smith v. Regents of the University of California*, 4 Cal.4th 843, 844 P.2d 500, 16 Cal.Rptr.2d 181, 188 (1993); *Galda v. Rutgers*, 772 F.2d 1060, 1066- 68 (3rd Cir. 1985); *Carroll v. Blinken*, 957 F.2d 991, 999 (2nd Cir. 1992).

The Seventh Circuit below did not use the compelling state interest test, but its version of the "germaneness test," which it viewed as distinct from, and less rigorous than, the

compelling state interest test. However, under either test, the Seventh Circuit stated that the students prevail:

> Conversely, the plaintiffs assert that strict scrutiny is the correct standard of review. However, because the plaintiffs win under the *Lehnert* analysis, the plaintiffs cannot complain as to the standard of review. Moreover, while the *Lehnert* analysis derived by the Supreme Court from *Abood* and *Keller* appears to be the appropriate test (as recognized by *Rosenberger*), we note that the Regents' policy also cannot survive the more exacting strict scrutiny standard.

Southworth, 151 F.3d at 731 n.13; Cert. Pet. at 43a n.13. Although the students here obviously agree with the result at the Seventh Circuit, they disagree that the compelling state interest test and the germaneness test are different tests.

The Seventh Circuit used *Lehnert* to analyze this student fee case because it is the most recent case in the *Abood* line. However, *Lehnert* awkwardly fits a student fee situation, because it assumes that the government has already established a compelling state interest to uphold a forced funding requirement. *Lehnert* does not apply in this case because the University has not first demonstrated that it has a compelling state interest supporting use of the coerced funding requirement. Although the Seventh Circuit was not wrong in using *Lehnert*, this Court should analyze this case according to a straightforward compelling state interest test.

The Ninth Circuit recently added to the confusion by ruling that in the context of mandatory student fees, "strict scrutiny is not required," *Rounds v. Oregon State Board of Higher*

Education, 166 F.3d 1032, 1038 n.7 (9th Cir. 1999). The Ninth Circuit explained that "because mandatory exactions do not involve personal endorsements, such exacting scrutiny is not required," *id.*, and instead used what it perceived as a lesser standard called the "germaneness test." *Id.* The Ninth Circuit is wrong because no decision of this Court allows the government to force people to fund others' advocacy as long as it is clear that the coerced individuals do not endorse the views they are forced to fund.

Therefore, this Court should clarify that the germaneness test is a specific application of the strict scrutiny test, used when a portion of a mandatory fee is justified by a compelling state interest. The germaneness test sorts out which expenses may be charged to the unwilling contributors as necessary for furthering the compelling state interest and which expenses may not. This Court should state clearly that the germaneness test is not a more permissive standard permitting more government coercion of individuals to fund offensive speech.

C. There Is No "Free Rider" Problem In This Case, So Use of the Germaneness Test Is Unnecessary.

The students' situation at the University does not parallel the "free rider" problem that existed between the dissenting employees and the union in *Abood*. A person would be a "free rider" if he could withhold all of his dues money from the union, yet still enjoy the higher wages and increased benefits negotiated by the union. This free rider issue convinced this Court in *Abood* and *Lehnert* to uphold compelled funding of collective bargaining costs, because the union's efforts resulted in tangible, quantifiable benefits to the employee. There is no parallel "free rider" issue in this case. The Third Circuit in *Galda* agreed, ruling that the free rider situation "does not exist in the circumstances here" of Rutgers' compelled fee system

at issue in *Galda*, 772 F.2d at 1067.

The only "benefit" the student-respondents receive from the organizations they object to funding at the University is the "benefit" of having the groups tell them that their beliefs are wrong. This is nothing like the concrete benefits of increased wages employees received in *Abood*. In this case, the constitutional issue is not that the funded groups may suffer from free riders, but that students are being ideologically "run over" by those driving the mandatory fee system.

Also, there is no free rider issue here because most of the funded groups desire to convert students and others to their viewpoint through their public advocacy. Their ideological zeal motivates them to promote their beliefs and recruit others to join their cause. They are not concerned with whether everyone attending their events paid the mandatory fee, but with convincing them to adopt their views. The free rider issue legitimately at issue in *Abood* and *Keller*, has no parallel in this case. Therefore, strict scrutiny applies here.

III.

THE UNIVERSITY FAILS TO SHOW A COMPELLING STATE INTEREST DONE BY THE LEAST RESTRICTIVE MEANS

A. The University Must Show A Compelling State Interest For The Specific Mandatory Fee Requirement, Not Its General Educational Mission.

The Constitution requires the University to show a compelling state interest for the *specific mandatory fee system*, not the general educational mission of the University. This Court said so in *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972):

> We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Although *Yoder* was a free exercise case, the Amish claim triggered strict scrutiny, which is the same test here. The University must show it has a compelling interest in forcing students to fund the political and ideological advocacy of groups the students find objectionable, and that there is no less restrictive means to accomplish this governmental interest. This the University cannot do.

B. The University Lacks a Compelling State Interest To Justify The Mandatory Fee.

The University's educational mandate may be broad, but it is constrained by the First Amendment. "We note that state colleges and universities are not enclaves immune from the sweep of the First Amendment," *Healy v. James*, 408 U.S. 169, 180 (1972). The University cannot define its educational mission so broadly that it can violate the First Amendment.

The University defines its educational mission as facilitating "exposure to diverse and competing views." Brief of

Petitioners at 42. With that rationale, the University can justify about anything in the name of education, even things that transgress the First Amendment. For example, there may be educational benefits in compelling students to attend religious chapel services, ("the homilies are informative") but the Constitution would prohibit such a compelled attendance requirement. *See, e.g., Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (rule mandating compulsory attendance at chapel services for students at the military academies is unconstitutional). It may be educational to have students recite the Pledge of Allegiance, or the Ten Commandments or the Communist Manifesto, but the University could not compel students to do so. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Universities may not invoke educational reasons to justify violations of students' constitutional rights. The University must implement its educational mission in a way that conforms to the Constitution.

The University's desire to use mandatory fees is also suspect because the University asserts an interest to justify it that is very similar to the basic First Amendment -- allowing differing viewpoints to compete for acceptance in the marketplace of ideas. Government generally cannot use compelled fees to promote the First Amendment, so neither should the University.

The Constitution's freedom of speech reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Justice Oliver Wendell Holmes wrote that freedom of speech operates best in a free marketplace:

> [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and [the] truth is the only ground

> upon which [the peoples'] wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

The university environment operates also as a marketplace of ideas. "The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). This Court in *Healy* stated that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" *Healy*, 408 U.S. at 180-81.

In a marketplace of ideas at a state university or elsewhere, the First Amendment prohibits government from compelling people to fund the speech of others. The reason for this is that the First Amendment leaves the ultimate decision of which ideas to accept or reject to the individual, not the state. "[A]n individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." *Abood*, 431 U.S. at 235. Also, this Court stated:

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.

Turner Broadcasting System v. FCC, 512 U.S. 622, 641 (1994). These reflect the words of Thomas Jefferson in the Virginia

Bill for Religious Liberty that "Almighty God hath created the mind free and ... that all attempts to influence it by temporal punishments, or burthens [sic], or by civil incapacitations, tend only to beget habits of hypocrisy and meanness." *Everson*, 330 U.S. at 12-13.

By extracting money from students and distributing it to various campus groups, the University is substituting its governmental judgment for the accumulated judgment of individuals as to which ideas and groups to support, oppose, or to remain indifferent about. Even if there is educational value to a compelled funding system, it transgresses the First Amendment. "To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. National Federation of the Blind*, 487 U.S. at 791.

The University cannot excuse a compelled fee on the grounds that it is helping those advocating under-represented viewpoints by giving them needed financial assistance so they can proclaim their message more effectively. This is merely the government substituting its value judgments for those of the individual, by imposing a financial disadvantage on individuals to enhance the voices of others. This the First Amendment condemns. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976).

The reason why the First Amendment leaves the decision of what ideas to support financially to the individual is because the decision of whom to fund is ultimately based on personal values and moral systems. Even if the University repealed all of its viewpoint-discriminatory policies restricting use of the

mandatory fee, the compelled funding system cannot ultimately be value-free and content-neutral, because University officials and the student government must use some moral or ethical yardstick to determine what groups to fund and how much they should receive. University officials and student government members will tend to fund those groups that espouse the ideas of those running the University, reinforcing their prevailing orthodoxies. At the University, the groups receiving the most money reflected were strongly liberal or left-wing, such as WISPIRG ($49,500.00); the Campus Women's Center ($34,200.00); the Lesbian, Gay, Bisexual Campus Center ($22,042.00) and the UW Greens ($6,905.00).

That is why Madison, Jefferson and the First Amendment leave such value-laden determinations about which ideas and viewpoints to support to each individual to make, rather than the government. The University distorts the natural workings of the marketplace of ideas with its selective subsidies coerced from the students.

C. The Compelled Fee System Is Not The Least Restrictive Means To Further Student Exposure To A Wide Range Of Ideas.

The University's system is not essential nor the least restrictive means to fulfill its interest that students be exposed to various competing viewpoints for the following reasons:

1. Student groups now express a wide range of viewpoints on campus without receiving any funding from the mandatory fee.

In the 1995-96 school year, at most 183 (29%) of the 623 Registered Student Groups at the University of Wisconsin-Madison received any type of funding from the mandatory fee.

That means that 71% of the student groups operated successfully on campus without using money coerced from other students.[1] It is doubtful that the organizations will wither without the mandated funding. They will simply lose the luxury of having the University do their fundraising for them.

Many nonfunded campus organizations advocate similar or the same ideas as the funded organizations. See J.A. 255-99 for various groups and a short description of their beliefs. A number of the nonfunded organizations are pro-environmentalist, support homosexual rights, feminism, abortion and socialism, just as the funded organizations do. This shows that there is significant support among the students for ideas espoused by the funded organizations. These organizations will not disappear if the funding system changes to conform to the Constitution because many students on campus support the ideas they espouse. The mandatory fee is not critical to their continued existence.

Student groups now express a broad spectrum of viewpoints at the University by holding meetings and rallies in campus buildings, distributing literature, publishing Internet websites, etc. The Constitution requires state universities to grant equal access to those facilities. *Widmar v. Vincent*, 454 U.S. 263 (1981). A financial subsidy to prop up a select subset of groups is not necessary to sustain the expression of diverse viewpoints on campus.

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[1] This is consistent with the experience at the University of Virginia at the time of *Rosenberger*. During the 1990-91 school year, only 34% of the official student groups at Virginia received funding from the mandatory student fee. "During the 1990-1991 academic year, 343 student groups qualified as [groups eligible for funding from the mandatory fee]. One hundred thirty-five of them applied for support from the SAF, and 118 received funding." *Rosenberger*, 515 U.S. at 825.

There is no long historical tradition of state universities using mandatory fees to fund activist groups. Student organizations have flourished for decades without funds from a compelled fee. Using mandatory fee money to fund political and ideological groups began during the Vietnam War era, as indicated by the explosion of litigation in the 1970's.

Before that time, state universities did not use mandatory fees to fund advocacy groups on campus. For example, in 1875, the student fee at the University of Wisconsin paid for "heating and lighting the university hall and public rooms, music, each diploma, and a matriculation fee in the law department." *The State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159, 163-64, 11 N.W. 472 (1882). In 1949, the fees paid for "admission to athletic contests, concerts, class dues, cap and gown fees, science laboratory fees, etc." 38 Op. Wis. Att'y Gen. 516, 518 (1949). The Wisconsin Attorney General in 1974 questioned whether the University could require students to pay a mandatory fee supporting a PIRG group, which was a new development on campus. 63 Op. Wis. Att'y Gen. 385, 388 (1974). The explosion of litigation on mandatory student fees did not begin until the 1970's, with the rise of student activism on campus. Universities have no long tradition of using mandatory fees to fund campus activist groups.

2. The University does not actively work to make sure it actually funds diverse or under represented viewpoints.

Those who allocate the fee money do not use it to promote "ideological affirmative action." That is, the University does not determine what viewpoints are "under represented" on campus and then fund groups espousing those ideas in order to broaden the range of viewpoints expressed on campus. Which

groups receive money depends on which groups apply and the value-based priorities of those controlling the student government.

Student organizations will spring up without a mandatory fee, because human beings attend state universities, and it is the nature of humans to join together with like-minded individuals to further a common cause. The mandatory fee does not create that phenomenon. Over 400 student organizations have formed at the University of Wisconsin without the mandatory fee. Why is that broad range of groups inadequate to show sufficient "diversity" on campus? Even if the University did want to implement "ideological affirmative action" on campus, it would be highly subjective to decide how many more groups need to be funded to show sufficient "diversity."

3. The University contradicts its goal of promoting diverse viewpoints by prohibiting funding to partisan political groups and religious groups.

One hallmark of a compelling state interest is that the government pursues it consistently. The official policy of the University prohibits the funded student organizations from engaging in partisan political or religious activity. J.A. 252. This shows that the University's formal fee system policies do not promote all viewpoints when other countervailing interests become more significant. The policy creates the interesting anomaly that the mandatory fee will not fund the Republicans or the Democrats on campus, but will fund the International Socialist Organization, WISPIRG and the UW Greens and their political activism because they are not "partisan." The California Supreme Court encountered a similar situation at the University of California and stated that funding the Young Spartacus League but not Republicans and Democrats "borders on the absurd" *Smith*, 16 Cal.Rptr.2d at 193-94.

IV.

THE EXISTENCE OF A *ROSENBERGER* FORUM DOES NOT NULLIFY THE STUDENTS' RIGHT TO BE EXEMPT FROM FUNDING OTHERS' SPEECH

A. *Rosenberger* Does Not Answer the Question Of Whether Students Have A Constitutional Right To Opt Out Of The Requirement To Funds Others' Advocacy.

This Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) does not answer the question presented in this case, because *Rosenberger* addresses how student fee money is distributed. *Abood* and *Keller* address the principles for how the fee money is collected.

The University claims that if it can show that it distributes the segregated fee in a viewpoint neutral manner as required under *Rosenberger* then it can compel students to pay the fee. The University reads *Rosenberger* much too broadly. This Court never intended *Rosenberger* to thwart the opt-out rights of dissenting students to be exempted from involuntarily funding the speech of others. Operation of a *Rosenberger* forum does not nullify the students' *Abood* rights.

This Court clearly stated that it was not dealing with the collection question in *Rosenberger*, and indicated that such a question would be resolved by *Abood* and *Keller*:

> The [student] fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller v. State Bar of California*, 496 U.S. 1, 15-16 (1990) and *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235-236 (1977).

Rosenberger, 515 U.S. at 840.

Additionally, Justice O'Connor in her concurring opinion in *Rosenberger* expressed an openness to the position that university students have a right to opt out of paying a mandatory fee that funds the advocacy of others under the First Amendment principles expressed in *Abood* and *Keller*.

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. [Citations to *Keller* and *Abood*]. There currently exists a split in the lower courts as to whether such a challenge would be successful [Citations omitted].

Rosenberger, 515 U.S. at 851.

The Seventh Circuit properly rejected the University's argument that *Rosenberger* addresses the collection issue:

> The Regents try to shoehorn this case into *Rosenberger*. However, as the Court made abundantly clear, it considered only the disbursement of student activity fees; it did not consider the constitutionality of forcing students to fund private political and ideological organizations. *Rosenberger*, 515 U.S. at 840.

Southworth, 151 F.3d at 722, n.1; Cert. Pet. at 23a, n.1. The Eighth Circuit recently reached the same conclusion that *Rosenberger* applies to distribution of student fees, not to their collection. *See Curry v. Regents of the University of Minnesota*, 167 F.3d 420, 422 n.4 (8th Cir. 1999).Therefore, the University errs by pointing to *Rosenberger* and away from *Abood* and *Keller* to decide this case.[2]

B. The University Can Obey The First Amendment Principles Expressed In *Abood* and *Rosenberger* Simultaneously And Without Conflict.

The University needlessly pits the *Abood* principle of "no compelled contributions" against the *Rosenberger* principle of "no viewpoint discrimination in distributing funds." Although both flow from the First Amendment, the University argues that they cannot or should not be implemented at the

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[2] The students agreed to a stipulation that "[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion," (J.A. 14-15), because the University does not enforce any of its formal policies that operate as viewpoint-based exclusions like the one struck down in *Rosenberger*. University policy prohibits campus organizations from spending student fee money for "[a]ctivities which are politically partisan or religious in nature." J.A. 252. The University has conceded that it could not enforce the ban on religious speech after *Rosenberger*. Another University policy prohibits campus groups from receiving GSSF funds if they "have a *primarily* political orientation (i.e. is not a registered political group)" (J.A. 238)(emphasis in the original) or "have a *primarily* religious orientation" *Id.* The University also prohibits campus organizations from using fee money "for any lobbying purposes." *Id.* The respondents could find no evidence that the University enforces these policies currently. For example, WISPIRG and the UW Greens lobby the state legislature with no consequences for violating University policy.

same time.

But there is no inherent tension between *Abood* and *Rosenberger*. They do not conflict or collide. Instead, they complete the protection for those who receive funding and those who pay mandatory fees. There is no reason why the University cannot implement both sets of First Amendment principles simultaneously in the operation of its fee system.

The University has a duty to obey the First Amendment. "We note that state colleges and universities are not enclaves immune from the sweep of the First Amendment," *Healy*, 408 U.S. at 180. Because the *Rosenberger* principles and the *Abood* principles both flow from the First Amendment, the University must implement both sets of principles at the same time.

That means that the University must abide by the equal access principle of the *Rosenberger-Widmar* line of cases by allowing all registered student organizations, whatever their viewpoint, to apply for funding. Additionally, the University must also abide by the principles of the *Abood-Keller* line of cases and exempt all objecting students from paying for the forum of funding for student groups.

To implement both sets of principles is to protect people from viewpoint discrimination in two different ways. All student groups, no matter what their viewpoint, are eligible to seek funding from the student fee fund, whatever the size of that fund (*Rosenberger*). Students are protected from funding viewpoints they would not voluntarily support financially (*Abood-Keller*). No exclusions due to viewpoints, no compulsions due to viewpoints. These principles are complementary, not contradictory. *Rosenberger* and *Abood* are not in conflict. They can both be implemented at the same time in the University's fee system.

C. *Rosenberger* Does Not Address Campus Groups Funded By Direct Referendum, Like WISPIRG.

Even if *Rosenberger* applies to cases involving collection f fees, it cannot apply to the situation in which a campus group receives funding by a direct referendum, because no *Rosenberger* forum exists in a referendum context. It is true that most of the campus organizations at the University receive their funding via one of the two systems involving application and evaluation by the student government - the GSSF and ASM processes (J.A. 16-17).

However, campus organizations can also receive funding by a third method -- approval directly by the students via a referendum. *Id.* WISPIRG receives $45,000[3] of its funding annually from the results of a 1993 referendum. J.A. 40. (See also Appendix of the Appellees, Seventh Circuit, No. 97-1001, p. 1 - "WISPIRG base funding of $45,000 passed by student referendum in 1993.").

Through the referendum process, the students approved a per capita assessment on each student for WISPIRG alone. During 1995-96, each student paid $ .71 to WISPIRG. J.A. 12.

The referendum process does not create a *Rosenberger* forum of money because only one group is funded. The referendum allowed a majority of students to force every student to fund WISPIRG. The money flows to the student government, which then hands the money directly over to

[3] In 1995-96, WISPIRG received $4,500.00 from the student government's GSSF grant process, in addition to the $45,000 it received from the 1993 student referendum, for a total of $49,500 in student fee money that year. J.A. 65; 185-86 and Appendix of Appellees, Seventh Circuit, No. 97-1001 p. 1.

WISPIRG. J.A. 18. The money is not distributed to a number of student organizations. Therefore, *Rosenberger* has no relevance to $45,000 of WISPIRG's annual funding.

But the *Abood-Keller* principle applies to a referendum funding system because the University compels the students to pay the fee imposed by the referendum. *Abood* and *Keller* apply to collection situations involving mandatory fees, whether generated by a referendum or a *Rosenberger* forum. *Rosenberger* in contrast addresses the important, but more limited situation of viewpoint restrictions a university uses when distributing student funds. *Abood* and *Keller* applies to WISPIRG's funding from the referendum, but *Rosenberger* does not.

D. The Students' Right Not To Fund The Advocacy of Others Is Not Nullified Because The Fee Funds Many Groups.

The University violates the First Amendment whether it compels students to fund one group or many. Thus, the University's argument that the student fee funds many groups, rather than one union as in *Abood* or one bar association as in *Keller*, is constitutionally irrelevant.

The student government compels payment of this money for the express purpose of funding the advocacy of campus groups. It is money that at least in part is specifically raised for the purpose of giving to student advocacy groups to underwrite their general overhead expenses. See list of "Appropriate SUF [Segregated University Fees] Expenditures," J.A. 247-251 (listing appropriate expenditures as including staff salaries, facilities, equipment, supplies, debt service reduction and promotional items).

It makes no difference that the student government acts as the "pass through" for the money from the pockets of the students to the coffers of the campus organizations. "That this slice of student activity fee is briefly in the hands of the Student Association while being funneled from students to NYPIRG does not diminish the fact that a transfer has taken place." *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992).

To claim that the students are funding a nonspatial forum and are not funding the various organizations obscures the reality of what actually happens. The money leaves the hands of the students and remains in the form of money when it reaches the various campus groups. The fee money funds the actual speech the groups express.

It is doubtful that the result in *Abood* would have been different if the union had funded multiple candidates for a political office rather than one. The fact that the union or the University chooses to fund multiple voices, even conflicting viewpoints, does not nullify the employees' or the students' right not to fund political and ideological advocacy they find objectionable.

It makes no difference for constitutional purposes that organizations funded by the mandatory fee "express viewpoints with which the plaintiffs both agree and disagree." J.A. 39. The *Abood* principle against coerced funding applies to all groups, whether one opposes them, agrees with them or is indifferent about them. The Third Circuit rejected the same argument the University makes here:

> [I]f the university compelled a student to make separate contributions to both the Democratic and Republican National Committees, the evil is not undone; it is compounded. Adherents to

> each party would be forced to pay a fee to the other political group, a clearly unconstitutional exaction.

Galda v. Rutgers, 772 F.2d 1060, 1067 (3rd Cir. 1985).

The historic context of Madison's Memorial and Remonstrance demonstrates that the government cannot force people to subsidize others' speech, even if the contributor agrees with the speech. The proposed bill that Madison opposed would have compelled Virginia taxpayers to fund only Christian teachers that they agreed with. *See Everson*, 330 U.S. at 36, 73; *Flast v. Cohen*, 392 U.S. at 106; *McGowan v. Maryland*, 366 U.S. at 465; *Flores v. City of Boerne*, 521 U.S. at 560 (O'Connor, J., dissenting). The government and the University cannot substitute their judgment for the individual's selection of which groups to support financially.

V.

ALLOWING STUDENTS TO OPT OUT OF PAYING THE FEE WILL NOT PERMIT TAXPAYERS TO OPT OUT OF PAYING FOR PARKS, SIDEWALKS AND SCHOOLS

Requiring the University to obey the First Amendment and allow students to opt out of funding its *Rosenberger* forum will not "open the floodgates" and permit people to opt out of paying for physical forums such as streets, sidewalks and public schools when they are used for expressive activities. The University and several amici argue that the students should lose because if they can opt out of paying for a nonspatial *Rosenberger* forum of money, then taxpayers can sue to have their taxes rebated when streets, parks, sidewalks, etc. are used for speech they find objectionable. Permitting students to opt

out of paying the mandatory fee will not open the floodgates for these hypothetical taxpayer cases.

A. Student Fee Money Is Not Tax Revenue.

Citizens could not sue cities for tax rebates when offensive groups like the Nazis march in the streets or rally in the park or school. Tax money funds their construction and maintenance. A taxpayer has no constitutional right to refrain from paying taxes for some purpose he or she opposes. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 385, n.16 (1984); *Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976); *Keller,* 496 U.S. at 12-13. However, student fees differ from taxes because they do not produce general operating revenues. *See Rosenberger*, 515 U.S. at 841. Allowing students to opt out of paying a mandatory fee does not translate into a taxpayer opt out action when objectionable groups use streets, sidewalks or public schools.

Also, government builds streets, sidewalks, city parks and public schools primarily for purposes such as transportation and public education, rather than expressive activities by private groups. An occasional protest march on a street, or meeting by a community organization in a public school, does not detract from that fact. Therefore, granting relief to the students here does not create a taxpayer cause of action.

B. Universities Determine Who Receives Fee Money By Extensive Investigations, Unlike Government's Ministerial Role In Scheduling Use Of Parks, Schools Or Sidewalks.

The government's involvement with student fees is much more extensive than the government's passive role in scheduling use parks and other physical forums for expressive

activities by private groups. Private groups or individuals decide whether they want to use the physical forum. The government only acts in a ministerial role in maintaining orderly scheduling of the facility.

In contrast, the typical university student fee system gives the student government and the Board of Regents significant involvement in the process and wide discretion to decide which groups will have access to the forum of money. The members of the student government peruse detailed applications, hold hearings and deliberate as legislative bodies to allocate the funds among the campus groups. The reason for this is that there is usually not enough money to go around, so the student government must determine who gets the money and how much. The student government has total discretion to deny access to the *Rosenberger* forum of money, but the government caretakers of a physical forum lack such sweeping discretion to deny groups access to the forum.

Physical forums and *Rosenberger* money forums operate differently regarding dissenters. If someone disagrees with the views expressed by a group meeting in a city park, the dissenter can organize his own rally and express his opposing views in the same park. But if the student government chooses to fund a group some students find objectionable, there is no equivalent recourse. Even if objecting students formed an opposing group and applied for funding, the University has total power to reject the application. The mandatory fee irrevocably takes money away from a student that he or she might have otherwise given to another campus organization that he or she supports.

The only way to protect the dissenting students' First Amendment rights is to allow them to decline to pay the mandatory fee. That allows the dissenting students to express their opposition to the ideas advocated by the funded groups.

C. Use of Student Fee Money "Consumes" the Forum.

A court can legitimately rule that students have the right to opt out of paying a mandatory fee but that taxpayers don't have a parallel right to opt out of paying taxes for parks and sidewalks because of the "consuming the forum" difference between the nature of money and physical places like streets and auditoriums. When the forum is a *Rosenberger* forum of money, the funded group's expressive activity "consumes the forum." The funded organization must spend the money in order to advocate its ideas, thereby "consuming" the forum. The money is gone, so a second group cannot reuse the same money to express opposing ideas.

In contrast, a physical forum like an auditorium or a park is not destroyed or "consumed" by a group expressing ideas there. Taxpayers opposing the Nazis when they rally in a park can hold a counter rally the next day in the same park. But if the campus Nazis receive $20,000 for the 1999-2000 school year, the money is gone and those who oppose the Nazis cannot re-spend the same money the next year. An opposing group has no guarantee that it will receive funding from the mandatory fee the next year when the student government makes its allocations. Because the act of advocacy consumes a *Rosenberger* forum, allowing student *Abood* rights to opt out of paying the fee before the advocacy group spends it is the appropriate way to protect the objecting students' right of conscience and right not to speak. However, because users of a physical forum do not consume it when they use it, taxpayers have no need for the same kind of recourse that students need when they are compelled to fund the advocacy of private groups.

D. Private Groups Use Many Physical Forums At No Cost To The Taxpayers.

Many governmental units charge fees to private groups for using physical public forums, such as a public school building. The fee covers the government's costs for the private group's use of the facility. The Fourth Circuit recently described such a fee system in an equal access building rental case. "This rent is designed to reimburse the School Board for any expense incurred by the use of the school." *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 708 (4th Cir. 1994). Taxpayers in these situations suffer no harm. They cannot claim they are subsidizing speech they disagree with because the groups using the building pay for all expenses incurred by their use of the facility.

E. *Pruneyard* Does Not Control This Case.

This case is not similar to *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) because the students have never allowed public access to their personal funds. The University contends that *Pruneyard* parallels this case and should control its outcome. In *Pruneyard*, this Court upheld a California Supreme Court decision permitting speakers to enter a privately-owned shopping mall and advocate their message. Petitioners' Brief at 33-35. Because the mall was open to the public, and the activists' message would not be associated with the mall owners, this Court ruled there was no violation of the owners' freedom of speech or constitutional rights under the Takings Clause. The University argues that the shopping mall in *Pruneyard* matches the student fee mechanism here and therefore should be upheld.

However, the relevant parallel to the *Pruneyard* shopping mall is not the funding forum, but to the money of the

individual students. The students have not opened the "private property" of the money in their wallets for use by the public the way the shopping mall owner opened his property to the public for their access. The University has drawn the parallel to the wrong place.

This Court later clarified that *Pruneyard* does not apply if the property owner objects to the message conveyed by those using his property, as the students do here:

> Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.

Pacific Gas & Electric Co., 475 U.S. at 12.

The students do not want their property -- their money -- being used to promote the message of campus groups they oppose. *Pruneyard* does not apply to this case.

VI.

AS THE LOWER COURTS DID, THIS COURT SHOULD STATE THE CONSTITUTIONAL PRINCIPLES GOVERNING POSSIBLE REMEDIES

A. Individual Students And Not University Officials Should Decide Which Campus Groups To Support Financially.

The Seventh Circuit and the District Court addressed the constitutional principles governing possible remedies to this violation of the students' First Amendment rights. The first principle this Court should point out is that individual students, and not the University, decide whether a group is "political and ideological" and should be supported finacially by the student. The First Amendment protects the right of individuals, not the government, to decide which private campus groups to support financially.

The test cannot be that the University has the responsibility to discern what speech by funded groups is "educational" enough to require all students to pay for it, and what speech is too "political and ideological" so that students cannot be required to pay for it. It would be a distinction too difficult and too subjective for University officials to make. That is why the First Amendment leaves such decisions to the consciences of individuals, not the government.

However, the First Amendment does not limit its protection to political and ideological speech. "But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters ... is not entitled to full First Amendment protection." *Abood*, 431 U.S. at 231. If this Court decides not to expand the "political and ideological

advocacy" category that it uses in the compelled fee cases, it should clearly state that individuals, not the University or the government, should determine what is "political and ideological" and what is not.

Also, it would be unconstitutional for the University to ban campus organizations from using the student fee money for "political and ideological" purposes. Such a viewpoint-discriminatory prohibition would violate *Rosenberger* and would not adequately protect the students' opt out rights. Any new system should have the students, and not the University deciding which campus groups to fund.

The University may require students to fund its own speech, or speech by private individuals the government authorizes to speak the official government message. In *Rosenberger*, this Court stated:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.

Rosenberger, 515 U.S. at 833. *See also Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

This means the University can force students to pay the salaries of University professors or pay for the University's course of studies. If this Court recognizes a right of students not to pay a fee that funds private campus advocacy groups, this will not mean that the students will also have the right to opt out of paying for the University Biology Department

because they disagree with something taught by a professor. Although professors have academic freedom to espouse their own viewpoints, they are still employees of the University and official facilitators of the University's degree-granting programs. There is no constitutional right to opt out of paying for the government's message.

The University can also compel students to pay for services that benefit all students, as long as the service offers a tangible benefit to students generally, like the increased wages and benefits negotiated by the unions for the employees in *Abood*. It is not a "service" to students for the University to force them to fund organizations espousing views the students oppose.

Therefore, students have no First Amendment objection to paying for a legitimate service, such as the health service, a shuttle bus or a tutorial service, as they do at the University of Wisconsin. One key to determine whether the organization offers a service rather than advocacy would be to determine whether the organization was formed by people joining together to advocate their common ideas collectively, or was the organization formed to provide a service that benefits a broad portion of the student body. If the University can show that the fee funds a service that benefits students like the increased wages in *Abood*, then the University can make that fee mandatory.

B. The University Cannot Have A Remedy That Takes Students' Money and Requires Them To Seek A Refund.

In fashioning a remedy, one constitutional rule the Seventh Circuit stated that the University must follow is that it "cannot even temporarily collect from objecting students the portion of the fees which would fund organizations that engage in

political and ideological activities, speech or advocacy, whether or not the organization also provides some a service in doing so." Cert. Pet. 50a.

The Seventh Circuit pointed out that this Court has ruled that a refund system for union dues does not meet constitutional standards. Cert. Pet. 46a-47a. *See Ellis v. Brotherhood Railway Clerks*, 466 U.S. 435, 443-45 (1984) and *Hudson*, 475 U.S. at 305 ("[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that the dissenters' funds may be used temporarily for an improper purpose"). The Third Circuit ruled that a "temporary exaction of the PIRG fee from plaintiffs could not be justified." *Galda*, 772 F.2d at 1062.

The University still violates the First Amendment rights of the students if it substitutes a "negative check-off" for its current system. A "negative check-off" is one in which a university takes the students' money, and requires the individual students to do something in order to get their money back. The student-respondents argue that only something like a "positive check-off" meets constitutional standards, because it preserves the right of individual students to determine which groups to fund. Under a positive check-off system, students must consent to the taking of their fee money by the University.

C. Constitutional Alternatives Exist In Which Campus Groups Could Receive Funding Without Violating The Rights Of Objecting Students.

The University could step out of the funding process for private campus organizations and allow them to succeed or fail on the merits of their own ideas. If the University wishes to remain in the funding process, it should make the system voluntary to comply with constitutional norms. Here are two

possible systems that would protect the students' First Amendment rights against coerced funding:[4]

1. Each student chooses which specific groups to fund.

The University could include with the fee statement a list of all the Registered Student Organizations. Each student would designate which groups he or she would like to fund. The total amount would be added to the fee statement and the student would voluntarily pay that amount. The University would then pass the money through to the student groups. This program would be similar to the federal employees' Combined Federal Campaign this Court described in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 790-91 (1985).

2. Each student decides whether to fund a "Subsidized Speech Fund"

Another acceptable remedy would be for the University to bundle all of the advocacy groups' funding into one category. The University could decide how much money it will award to each group. On the fee statement, there would be a line for the "Subsidized Speech Fund," with a statement explaining that it subsidizes student groups, and list how much each student should donate in order to fully fund this endeavor. Each student would decide individually whether to check that box and add

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[4] The University objects that possible solutions like these nullify the student government's power under the "shared governance" in Wisconsin Statute 36.09(5). This statute gives the student government some governmental authority to allocate funds collected from students from a mandatory fee. However, the student government and the Wisconsin Legislature must obey the First Amendment. Shared governance does not permit the student government to violate the First Amendment rights of individual students.

that amount to his or her fee statement. This program is similar to the ones many states, including Wisconsin, operate through their state income tax forms. The state lists a number of charities, wildlife preservation funds and political parties and asks taxpayers to check off any of the groups they wish to contribute to.

CONCLUSION

The students respectfully request that this Court affirm the judgment of the Seventh Circuit.

Date: August 13, 1999

Respectfully submitted,

JORDAN W. LORENCE
Northstar Legal Center
P.O. 2074
Fairfax, Virginia 22031
(703) 359-8619
Counsel of Record

DANIEL KELLY
Reinhart, Boerner, Van Dueren
Norris, and Rieselbach
1000 North Water St.
Milwaukee, Wisconsin 53202
(414) 298-8284

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Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

**Counsel of Record*

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ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROHIBIT A PUBLIC UNIVERSITY FROM REQUIRING STUDENTS TO SHARE EQUALLY IN THE COSTS OF CREATING A *ROSENBERGER* FORUM.

A. Respondents' attempt to disavow their stipulation of viewpoint neutrality in the distribution of student fees lacks record support. This attempt should not detract from consideration of the question of whether the First Amendment requires that public university students be permitted to opt out of sharing the costs of creating a student fee forum.

This case presents the Court with the issue reserved in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, "whether an objecting student has the First Amendment right to demand a pro rata return to the extent the [student] fee is expended for speech to which he or she does not subscribe." 515 U.S. 819, 840 (1995).

Rosenberger held that a public university violated the First Amendment by discriminating on the basis of viewpoint in the distribution of student fees used to cover the printing costs of student publications. In this case, respondents did not challenge the University's segregated fee as failing to comply with *Rosenberger's* requirement of viewpoint neutrality. To the contrary, respondents explicitly stipulated that "[t]he process for reviewing and approving allocations for funding [to student groups] is administered in a

viewpoint-neutral fashion" (Stip. ¶ 12; Pet-Ap. 106a).[1] Consistent with their stipulation, respondents expressly acknowledged below that the University had created a non-spatial forum for speech through the imposition and distribution of the challenged fees. (Plaintiffs' Reply Br. at 3 (W.D. Wis. filed Oct. 27, 1996), R. 42).

Respondents did not submit a proposed finding of fact or conclusion of law in moving for summary judgment that the process of reviewing and approving fee applications discriminated on the basis of viewpoint (*see* J.A. 181-235). Furthermore, the record lacks any evidence that any student group has ever been denied a funding request, no matter its point of view. Neither the district court nor the court of appeals based its judgment on a finding of viewpoint discrimination in the distribution of fees.

Although respondents continue to argue that they are entitled to opt out of supporting the creation of a *Rosenberger* forum, their discussion of this central issue is clouded by their attempts to distance themselves from their stipulation of viewpoint neutrality.[2]

Respondents fail to identify any support for their view because no part of the record supports their assertion

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[1]The abbreviation "J.A." identifies the indicated pages from the parties' Joint Appendix; "Pet-Ap." refers to the Appendix to the Board of Regents' Petition for Writ of Certiorari; "R." identifies the district court docket entry by number (*see* J.A. 4-7).

[2]For example, respondents refer to the University's "substituting its governmental judgment for the accumulated judgment of individuals as to which ideas and groups to support, oppose, or to remain indifferent about," Resp. Br. at 27, to "all of [the University's] viewpoint-discriminatory policies restricting use of the mandatory fee," *id.* at 27-28, and to the University's "selective subsidies" and "financial subsidy to prop up a select subset of [student] groups." *Id.* at 29. At the top of page 31, respondents assert that which "groups receive money depends on . . . the value-based priorities of those controlling the student government."

that the funding system is not viewpoint neutral. The only arguable support for this claim consists of respondents' impression that liberal/left groups receive a larger portion of fees than other groups -- an assessment which lacks both rigor and significance, since there is no evidence that any group has been denied support because of its political perspective (*see* Resp. Br. at 28). Even if it were true, that some groups utilized the forum more than others, such a situation is hardly proof of viewpoint discrimination. It would be remarkable to observe the local chapter of the Industrial Workers of the World seeking parade permits more often than the local AFL-CIO Council. Respondents' impressionistic assessment is itself hard to credit in light of a record showing ASM events grants going not only to the Wisconsin Union Directorate for "Wake Up Little Susie," but also to the Federalist Society for debates on affirmative action and tort reform, to the Chinese Independent Union for movie showings, dance parties and the Chinese Spring Festival, to the Wisconsin Union Directorate for its Silent Film Festival and for the Winter Carnival, to the Wisconsin Black Student Union for showing a Million Man March Video, to the Women's Law Student Association for the Women's Law Conference, to the India Student Association for a sitar concert, to give just a few examples (J.A. 139-43). The same record shows regular or last minute ASM operations grants going to groups as diverse as the American Society of Landscape Architects, the Entomology Graduate Student Association, the Pre-Veterinary Association, the Pakistan Students Association, the Jewish Coalition, Minority Graduate Students in Business, the UW Scandinavian American Association, the International Socialist Organization, Asian Christian Fellowship, Delta Sigma Theta Sorority, Sigma Gamma Rho Sorority, the Hellenic Student Association and Students of Objectivism (J.A. 143-52), again to cite just a few examples.

The parties' stipulation of viewpoint neutrality, the absence of evidence of the denial of any group's application

for funding, and the evidence of diverse student speech funded through ASM grants, continue to present as the issue in this case, the mandatory funding of a student fee forum.

B. The compelling state interest standard is not the appropriate standard for determining whether a public university may require students to share in the costs of creating a student fee forum.

With respect to the question reserved in *Rosenberger*, respondents' basic argument rests on a refusal to differentiate among any of the gradations of compulsion and burdens of conscience in cases where there is some component of state compelled support for ideas with which an individual disagrees. To respondents, any such compulsion constitutes compelled speech, to be assessed solely under a compelling state interest standard.

This is not the law. The difference between compelled speech and compelled funding of other's speech was recognized in *Lathrop v. Dohonue*, 367 U.S. 820, 828 (1961), upholding Wisconsin's creation of an integrated bar. The Court described the requirement of bar membership as involving "compelled financial support of group activities, not with involuntary membership in any other aspect." *Id.*

Glickman v. Wileman Bros. & Elliot, 521 U.S. 457, 469-70 (1997), distinguished between actual compelled speech and compelled financial support for another's speech in a case challenging an assessment of members of California's fruit growing industry used for generic advertising. There, the Court held advertising assessments were not actual compelled speech because they did not require the businesses

> to repeat an objectionable message out of their own mouths, cf. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 . . . (1943), require them to use their own property to convey an antagonistic ideological message, cf. *Wooley v. Maynard*, 430 U.S. 705 . . . (1977), *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 18 . . . (1986) (plurality opinion), force them to respond to a hostile message when they "would prefer to remain silent," see *ibid.*, or require them to be publicly identified or associated with another's message, cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980).

Glickman, 521 U.S. at 471. Nearly all of the actual compelled speech cases cited in this passage are the cases respondents rely on for asserting the basic First Amendment principle of "No Coerced Funding of Others' Advocacy" (*see* Resp. Br. at 14-18).

A Majority of the Court in *Glickman* interpreted "*Abood* [*v. Detroit Bd. of Education*, 431 U.S. 209 (1977)], and the cases that follow it, [as] not announc[ing] a broad First Amendment right not to be compelled to provide financial support for any organization." *Glickman*, 521 U.S. at 471. The correct answer, dispositive here, is that being compelled to fund a forum -- whether spatial or non-spatial in character -- is fundamentally different from being compelled to finance the speech of a specific organization. The compelling governmental interest standard is not appropriate in every case touching on First Amendment values. For example, it did not provide the standard in the compelled forum case of *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Even if respondents are correct that *Abood* and *Keller v. State Bar of California*, 496 U.S. 1 (1990), reflect an implicit requirement of the compelling state interest standard where mandatory assessments fund the speech of a single organization, that requirement will not

logically extend to mandatory funding of a limited public forum where any organization may participate in a university setting.

C. Compelled funding of a *Rosenberger* limited public forum should be treated the same as compelled funding of a traditional, spatial forum.

1. No principled difference exists between a university's requiring students to contribute to the costs of constructing a spatial forum, such as an auditorium, or to pay a fee for the costs of providing internet access to student groups, and its asking students to pay a small, uniform fee to defray some of the other costs associated with student expression. As *Rosenberger* recognized, a student fee system such as that found at the University of Virginia (and therefore that existing at the University of Wisconsin) "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." 515 U.S. at 830.

Respondents offer no persuasive justification or authority for treating a *Rosenberger* student fee forum differently. Their argument that an individual's beliefs should be shaped by his mind and conscience, rather than by the state (Resp. Br. at 26, citing *Abood*, 431 U.S. at 235), has no bearing with respect to public forums. The creation of a forum involves no state coercion that certain beliefs be held or espoused. Respondents write that "[b]y extracting money from students and distributing it to various campus groups, the University is substituting its governmental judgment for the accumulated judgment of individuals as to which ideas and groups to support, oppose, or to remain indifferent about" (Resp. Br. at 27). This is simply untrue. It is the free choice of individual student groups choosing to apply for grants that determines which ideas will be expressed. Respondents also suggest that the University is seeking to "restrict the speech of some elements of our society in order to enhance the relative voice of others" (Resp. Br. at 27,

quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)). Respondents have not identified any restriction on student speech resulting from the distribution of modest grants to student organizations. Respondents appear to view the small reduction in their disposable income as a restriction on their ability to contribute money to groups they support (*see* Resp. Br. at 41), but their payment of tuition or their mandated support for University athletics and the University Health Center would constitute a comparable restriction. A similar argument was expressly rejected in *Glickman*, 521 U.S. at 470:

> Respondents argue that the assessments for generic advertising impinge on their First Amendment rights because they reduce the amount of money that producers have available to conduct their own advertising. This is equally true, however, of assessments to cover employee benefits, inspection fees, or any other activity that is authorized by marketing order. The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget.

Moreover, respondents' argument ignores their right to obtain a grant to facilitate the speech of their own student groups.

Respondents next argue, that while *Rosenberger* commands that there be "no viewpoint discrimination in distributing funds," *Abood* stands for the non-conflicting principle that there be "no compelled contributions" (Resp. Br. at 34). The two principles together yield respondents' symmetric slogan: "No exclusions due to viewpoints, no compulsions due to viewpoints" *(id.* at 35). Respondents' slogan, however, does not make sense and does not offer a

principled basis for decision of this case. In *Abood* and *Keller*, the union and bar dues were not distributed on a viewpoint neutral basis. This Court did not adopt respondents' symmetric standard, requiring the viewpoint neutral distribution of the assessments to member groups. Rather, it was the fact that only one point of view was being funded that required the recognition of an opt out right. In the instant case, the imposition of a single fee, payable by all students without regard to their beliefs, could not be more viewpoint neutral with respect to collection. The fee would therefore satisfy the second prong of respondents' slogan, "no compulsions due to viewpoints." In contrast, allowing students to opt out based on their views of the speech of individual groups would create a viewpoint-based collection system, in which groups with the greatest popular support would receive the most funds.

Respondents go on to argue that *Rosenberger* does not address the funding of the Wisconsin Student Public Interest Research Group (Wisconsin Student PIRG), which was approved by student referendum (*see* Resp. Br. at 36-37). We agree with respondents' general point that a process which funds a single group cannot be regarded as a *Rosenberger* forum. A union or bar association, when speaking on its own behalf, presumably reflects the views of a majority of its members. This does not render its speech viewpoint neutral, but instead requires, at a minimum, that dissenting members be able to opt out of funding non-germane, ideological or political advocacy. *See Glickman*, 521 U.S. at 471. The record does not contain evidence of GSSF funding being denied to a student group on the basis of viewpoint. However, the justification for requiring all students to support GSSF funding generally, and not simply that going to the Wisconsin Student PIRG, is not that they constitute a *Rosenberger* forum, but that they provide services to significant numbers of UW-Madison students. The important point here is that respondents' qualification regarding a single student organization's GSSF funding has

no bearing on the ASM funding going to more than one hundred student groups, which does result in the creation of a *Rosenberger* limited public forum.

According to respondents, it is irrelevant that the challenged fees fund one group or many (*see* Resp. Br. at 37). The argument does little more than beg the question, treating any financial support for expressive activities of student groups as compelled speech, even when distributed on a viewpoint neutral basis and for the purpose of facilitating the speech of any student group. The Regents submit that the non-discriminatory availability of student fees to all student groups and their utilization by over one hundred is proof that respondents err in arguing that they are being compelled to do something fundamentally dissimilar from funding a traditional public forum.

2. Respondents identify a number of perceived distinctions between a traditional public forum and a *Rosenberger* forum which, in their view, will prevent the floodgates from opening to taxpayer challenges to funding traditional public forums, should their claimed opt out right be recognized (*see* Resp. Br. at 39-44). The argument fails for two reasons. First, it fails to consider any of the similarities between being required to support the creation of a traditional, physical forum and being required to support the creation of a non-spatial, student fee forum. Second, the distinctions respondents put forward are either non-existent or immaterial to First Amendment concerns.

Whether a traditional public forum or a limited, non-spatial public forum is created, the only potential burden is on the conscience of those required to support the creation of the forum. No speech or membership is actually compelled in either case and the speech of the objected-to group is neither attributed to nor perceived as belonging to those compelled to support the forum's creation or maintenance. In both cases, support for the forum is through generally

applicable fees or taxes. In both cases, a person who finds ideas expressed through the forum objectionable has the right to use the forum to express his own views. *See generally* Pet. Br. at 24-36. Government action is most consistent with First Amendment values when in entails the creation of a forum. At a basic level, we disagree with respondents' assertion that "[g]overnment generally cannot use compelled fees to promote the First Amendment . . ." (Resp. Br. at 25).

Respondents argue that a *Rosenberger* forum can be distinguished from a traditional public forum because it is not supported by tax revenues. Respondents' argument would concede that if the less than $4.28 per student distributed as ASM grants (J.A. 134) or the $0.47 per student going to the Campus Women's Center (J.A. 37-38) were funded directly by state tax revenues[3] -- with respondents asked to pay slightly higher tuition or non-allocable fees to make up the difference, respondents would not claim any First Amendment violation (Resp. Br. at 39-40). The imposition of student fees to fund student expression is analogous to the use of general tax revenues in that the revenues are collected on a non-discriminatory basis from all students. This is one of the reasons that the speech of student groups is not perceived as speech of all students.

One difference between fees and taxes that would tend to attenuate any perceived burden on conscience, is the greater degree of voluntariness involved in the decision to attend the University of Wisconsin, as opposed to paying state taxes.

Respondents suggest that many traditional forums -- streets, sidewalks, city parks and public schools -- are constructed for purposes other than the expressive activities

[3]For 1995-96, the Wisconsin Legislature appropriated more than $800 million of state general purpose revenues to the UW System. Wis. Stat. § 20.285 (1995-96).

of private groups (*see* Resp. Br. at 40). This is neither true -- governments also construct auditoriums, convention centers, centers for performing and visual arts -- nor meaningful. If anything, the creation of a forum to promote speech enhances the legitimacy of the governmental expenditure.

Respondents' next distinction between a traditional, physical forum and a non-spatial student fee forum rests on the unsubstantiated claim that "the typical university student fee system gives the student government and the Board of Regents . . . wide discretion to decide which groups will have access to the forum of money" (Resp. Br. at 41). Respondents later write that "[e]ven if objecting students formed an opposing group and applied for funding, the University has total power to reject the application" (*id.*). Neither the district court nor the court of appeals based its decision on this supposed unfettered discretion, and respondents have not identified any part of the record demonstrating its use. As previously discussed, the claim is essentially that the University has failed to create a *Rosenberger* forum, not that respondents have a First Amendment right to opt out of supporting a *Rosenberger* forum where one has been created. *Rosenberger* expressly prohibits a public university from denying fees to student groups based on viewpoint. At bottom, respondents are asserting that "the University has total power to" disregard the holding in *Rosenberger*, which is false.

Respondents' claimed distinction, that a student fee forum involves the consumption of limited resources, is largely correct, but immaterial (*see* Resp. Br. at 42). In *Rosenberger*, the University of Virginia had argued similarly that "funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not." 515 U.S. at 835. Because a state is required "to ration or allocate the scarce resources on some acceptable neutral principle," *id.*, the distinction does not alter the basic constitutional fact that the student fee system results in the

creation of a limited public forum. Moreover, "in any given case this proposition [regarding relative scarcity] might not be true as an empirical matter." *Id.* Use of a traditional public forum can involve the expenditure of significant public resources, as where police must be stationed to protect the speaker or retain order. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) ("the opinions which [demonstrators] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection").

Respondents rely on essentially the same distinction in arguing that "[m]any governmental units charge fees to private groups for using physical public forums, such as a public school building" (Resp. Br. at 43). Whether or not this is true, the First Amendment does not require that the cost of using a traditional public forum be charged to the group or individual using it.

D. Mandatory funding of a *Rosenberger* forum furthers the University's compelling interests in extending education beyond the classroom by means that are narrowly drawn to achieve that end.

Even assuming the compelling governmental interest standard applied, the use of student fees to create a *Rosenberger* limited public forum meets that standard. The vital state interests furthered by the funding of a student fee forum lie in the University's ability to offer educational opportunities that extend beyond the classroom and campuses (*see* Wis. Stat. § 36.01(2)), including the opportunity to hear diverse viewpoints, to participate in varied organizations, to receive course credit through internship programs, to bring the ideas of the classroom to the community, to develop one's own voice, to fulfill one's civic duties and to learn tolerance towards the speech of others. Respondents do not offer any evidence to controvert

the University's showing that providing resources for independent student expression is central to the University's educational mission as defined by the Wisconsin Legislature (*see* Pet. Br. at 41-45).

The imposition of a modest student fee, payable by all students, represents means that are "narrowly drawn to achieve that end." *See Widmar v. Vincent*, 454 U.S. 263, 270 (1981).[4] The alternatives respondents offer would result in student groups receiving fewer resources, depending on their level of popular support. This would necessarily result in a diminution in the amount of student speech occurring on the UW-Madison campus. It is not possible to know the full extent of this diminution -- there is nothing in the record attempting to measure the variance in the amount of speech, and respondents' assertions to the contrary are without factual citation and support -- but it is virtually certain to

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[4]Some circuit courts that have applied the compelling state interest standard have found that mandatory student fees are the least restrictive means of promoting a university's compelling governmental interests in the free exchange of ideas, extracurricular life and civic duty. *See Carroll v. Blinken*, 957 F.2d 991, 1001-02 (2d Cir. 1992) ("the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate -- together are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG. We also believe that these interests would be served less effectively absent the activity fee distribution regulation. . . . [A]n alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate."); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) (university's funding of a student-run newspaper is "a narrowly tailored means" of advancing university's educational goals); and *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) ("The University's academic judgment is that the [student news]paper is a vital part of the University's educational mission, and that financing it is germane to the University's duties as an educational institution. . . . It would appear, therefore, that funding by mandatory student fees is the least restrictive means of accomplishing an important part of the University's central purpose, the education of its students."); *but see Southworth v. Grebe*, 151 F.3d 717, 731 n.13 (7th Cir. 1998), Pet.-Ap. 43a n.13.

occur. Moreover, a system of voluntary contributions would give the majority power to determine which speech is funded to a degree that the challenged system never would. An important casualty of an opt out system is the First Amendment value of tolerance for speech with which we do not agree. Because respondents are able to obtain funding for their own student groups, the challenged fee system establishes the means for their responding to, rather than silencing, objectionable speech.

II. ON THE RECORD OF THIS CASE, THE UNIVERSITY OF WISCONSIN MAY, CONSISTENT WITH THE FIRST AMENDMENT, REQUIRE STUDENTS TO PAY FEES USED TO PROVIDE STUDENT SERVICES.

While the speech of GSSF-funded organizations contributes to the atmosphere of inquiry and debate on the UW-Madison campus, the parties stipulated that "[t]he General Student Services Fund provides a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13; Pet.-Ap. 106a). We do not dispute that some GSSF-funded groups engage in some political speech, however respondents' examples frequently rest on disputed facts or incorrect assumptions. Even where political speech has occurred, a number of principles sustain the system of mandatory fee funding at the University of Wisconsin-Madison.

1. The provision of services to a significant number of students represents an important university function. Respondents concede that the University may compel students to support student services, although the scope of such services is left nebulous, ranging from "services that benefit all students," to those regarded as "a legitimate

service," to those which constitute "a service that benefits a broad portion of the student body" (Resp. Br. at 47). The suggestion that services must benefit all students does not have any constitutional basis and would preclude student fee funding for the Student Health Service, the GUTS Tutorial Program, the SAFE Ride Bus and the issuance of Madison Metro bus passes. Otherwise, respondents' concession is an acknowledgement of error, given the stipulation of GSSF funding of direct, ongoing services to significant numbers of students. Respondents again attempt to disavow their stipulation when they assert that "the only 'service' provided by many GSSF-funded groups was advocating their viewpoints to others and urging them to join their causes" (Resp. Br. at 3). In contrast to respondents' claims concerning the Campus Women's Center's lack of services, the record reveals that the Center "provide[s] free child care for student parents by matching volunteers with prospective mothers and fathers and [is] actively involved in the Child Care Tuition Assistance Program" (J.A. 175). It also runs "student facilitated support groups for . . . depression, eating disorders and surviving sexual assault" (*see* J.A. 175). *See also id.* at J.A. 179, ¶ 3 (the Campus Women's Center and Lesbian, Gay, Bisexual Center provide "important sources of support" to student populations and "serve as evidence that they are welcomed to the University community").

Respondents' assertion that "[t]he lower courts were not persuaded by the University's evidence of bare denials by the leaders of the funded groups offered in their affidavits, in light of the overwhelming evidence of their advocacy and activism" (Resp. Br. at 12) is not justified.[5] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are [trier of fact] functions, not those of a judge . . . ruling on a motion

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[5]Respondents' suggestion that the University did not dispute their facts concerning groups is belied by the University's response to plaintiffs' proposed findings of fact, which is reproduced at J.A. 181-235.

for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Respondents' description of the lower courts' rejection of the Regents' factual showing serves only to concede error.

2. To the extent GSSF-funded groups engage in political speech, the record reveals that it is part and parcel of the groups' services. For example, the Wisconsin Student PIRG's GSSF application lists a number of advocacy projects. These include a grass roots campaign to persuade Madison's congressman to support a bill to shift funding from fossil fuel to renewable energy research, an effort to investigate and draw attention to the issue of playground safety, the submission of comments to the Department of Agriculture in support of the Ancient Forest Protection Plan, a canned food drive, and the staffing of a voter education table and hotline (*see* J.A. 350-52). But at the same time Wisconsin Student PIRG provides the opportunity for students to participate in course credit internships (J.A. 172-73, ¶ 4, J.A. 352 (noting 60 internships)).[6] Associate Dean Roger Howard testified in his affidavit that "WISPIRG especially has been effective in helping students identify projects that fit with their academic work in the classroom so that students can experience both service and learning around the same topic" (J.A. 180, ¶ 3).[7]

[6]When an organization is providing hands-on experience for which numerous students can get course credit, it is reasonable that the organization selected have broad campus support.

[7]Many of respondents' facts regarding the political activities of the Wisconsin Student PIRG were disputed in the district court, largely due to confusion between the student and state organizations (WISPIRG) (*see* J.A. 185-92). Respondents did not submit to the district court a proposed finding concerning the Wisconsin Student PIRG's financial support for either the state or national PIRG organizations (*see* J.A. 181-235). Parts of the record relating to this issue are difficult to reconcile without further information not presently included in the record. *Cf.* J.A. 65-66 (Excerpt from student PIRG GSSF Funding Application J.A. 172-73, ¶ 8 ("The Wisconsin State Public Interest Research Group receives no student fees from the University of Wisconsin System") and

3. Some of the "political speech" respondents object to is simply that occurring on a forum provided by GSSF-funded groups. For example, respondents continue to characterize the Women's Center as engaging in abortion rights and other political advocacy (*see* Resp. Br. at 6-7). However, the record establishes that this speech results from the publication of a newsletter "for the expression of ideas important to women, regardless of which side of an issue is being supported" (J.A. 176, ¶ 5). Similarly, the dispute of respondents' continued claims that the UW Greens distributed Ralph Nader campaign literature was noted in our opening brief (*see* Pet. Br. at 11; J.A. 174-177; J.A. 166-67). The use of public university fees to support the publication of one or more campus newspapers differs from *Rosenberger*, which involved funding for multiple student group publications. The use of mandatory fees has nevertheless been consistently upheld out of the realistic recognition that campus newspapers constitute a type of forum, as well as provide a valuable journalistic opportunity to students. *See, e.g., Kania v. Fordham*, 702 F.2d at 477; *Veed v. Schwartzkopf*, 353 F. Supp. 149, 153 (D. Neb. 1973), *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973); *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d 568 (1973).

4. As has been discussed, the viewpoint neutral and general availability of ASM funding results in the creation of a *Rosenberger* forum, whose mandatory funding furthers the values of both the First Amendment and public higher education. The record reveals that the event respondents refer to as pro-choice art was funded through an ASM events grant and an Anonymous Fund grant (J.A. 140, J.A. 333, J.A. 338, Bates #s 648-51, R. 19). There is no evidence of GSSF

¶ 13 ("Funds allocated to Wisconsin Student PIRG by the student government are used solely to support the programs of Wisconsin Student PIRG . . .").

funding going to this event. At the same time, the Wisconsin Union Directorate's grant application underscores the fine, and not always tenable, line between political and academic expression. The Co-Director of the Women's History Program supported the Wisconsin Union Directorate's events grant application as being "of particular interest to students working in the areas of women's history and women's studies" (J.A. 336), while the Director of the Women's Studies Research Center agreed to co-sponsor the display (J.A. 337).

5. Where speech is funded by voluntary contributions, students are, in effect, already granted a right to opt out of supporting the speech. The record indicates that the Gay and Lesbian Film festival, which respondents cite as an example of political speech (Resp. Br. at 7), was either self-funded or funded through an ASM grant (J.A. 209-10, ¶35, Bates #s 1340-47, R. 19). Respondents object to providing any financial support for a student group for the sole reason that it engages in political speech with which respondents disagree, even though no funds were used for this purpose. This cannot be the law. *Compare Abood* and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Accepting respondents' view would mean that a member of a labor union who objected to its political advocacy would have a First Amendment right, not simply to avoid funding the objected-to advocacy, but to avoid supporting the union at all.

6. Finally, with neither precedent nor reasoning to support it, respondents propose that the validity of GSSF funding should rest on a judicial determination as to "whether the organization was formed by people joining together to advocate their common ideas collectively, or . . . formed to provide a service that benefits a broad portion of the student body" (Resp. Br. at 47). Respondents make no attempt to show how, under this standard, the judgment of the court of

appeals could be sustained. The standard was not argued below nor relied on by either court.

III. THE ISSUE OF THE APPROPRIATE REMEDY IS NOT BEFORE THIS COURT.

The University believes that the question of the appropriate remedy lies outside the question presented. As in any case, the definition of the substantive right necessarily precedes and informs the issue of remediation.

The Regents are not before the Court as private litigants but as an arm of the State of Wisconsin, claiming the rights of sovereignty, while fully accepting their obligation to conform State policies to the superior requirements of the federal Constitution. Based on principles of comity and federalism, the Seventh Circuit correctly held that an injunction specifying the procedure for complying with a declaration of invalidity was not warranted at this stage of the case (Pet-Ap. 49a-50a). Respondents did not cross-petition for review of this part of the court of appeals' judgment. If the court of appeals' judgment is affirmed in whole or in part, the Regents respectfully submit that the issue of further relief need not be considered at this time.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

PETER C. ANDERSON
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

*Counsel of Record

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No. 98-1189

In the

Supreme Court of the United States

Board of Regents, University of Wisconsin,
Petitioner,

v.

Scott Southworth, et. al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION; RAYMOND L. BROSTERHOUS III; WILLIAM G. HOLLINGSWORTH; LISA R. HOLLINGSWORTH; AND JEFFREY D. FERNANDES IN SUPPORT OF RESPONDENTS

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae

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QUESTION PRESENTED

Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.

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IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, Raymond L. Brosterhous III, William Hollingsworth, Lisa Hollingsworth, and Jeffrey Fernandes respectfully submit this brief amicus curiae in support of Respondents Scott Southworth, *et al.*[1] All parties consented to the filing of the brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has adopted a legal policy objective that the government may not force people to make involuntary payments of funds that will be used for political or expressive purposes. To that end, PLF is submitting this brief to provide an additional viewpoint with respect to the issues presented. PLF attorneys were counsel of record in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and have participated as amici in numerous other compelled fee cases, including *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). PLF attorneys also represented the student objectors in *Smith v. Regents of the University of California*, 4 Cal. 4th 843, *cert. denied*, 510 U.S. 863 (1993). Except as otherwise noted, PLF attorneys represent the other amici described below in their own challenges to unconstitutional governmental uses of mandatory fees.

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Raymond L. Brosterhous III, was one of the plaintiffs in *Keller v. State Bar of California*, 496 U.S. 1. In 1992, after the State Bar failed to comply with the requirements of *Keller*, and continued to compel individual attorneys to pay for lobbying and other ideological activities unrelated to regulation of the legal profession or improving the quality of legal services available to Californians, Mr. Brosterhous sued again. That case, *Brosterhous v. State Bar of California*, is pending in California Superior Court for the County of Sacramento (Case No. 527974). One of the issues in *Brosterhous* is the level of scrutiny to be applied to the State Bar's actions. On a pretrial motion, the trial court ruled that this Court's precedents demanded strict scrutiny, but the State Bar continues to argue that a far more deferential standard should be applied.

William Hollingsworth, Lisa Hollingsworth, and Jeffrey Fernandes were students at Lane Community College in Oregon. They objected to paying a mandatory fee to subsidize the Oregon Student Public Interest Research Group (OSPIRG). In an unpublished decision issued March 24, 1999 (Case No. CV-95-6321-CO), the Ninth Circuit Court of Appeals rejected their First Amendment claims against the college. In its decision, the Ninth Circuit found that First Amendment claims in the student activity fee context warranted only intermediate scrutiny. The *Hollingsworth* students filed a petition for rehearing in the Ninth Circuit pending this Court's resolution of this case.

Amici believe the significance of this case extends beyond the context of mandatory student activity fees because it goes to the heart of First Amendment jurisprudence applicable to all types of compulsory funding. Amici seek to augment the arguments in the parties' briefs by concentrating on the legal standard of strict scrutiny that must be applied in all First

Amendment cases, including those related to mandatory fees. Moreover, amici believe that their litigation experiences applying this Court's precedents in both the integrated bar and student activity fee contexts will provide this Court with a broader policy viewpoint than that presented by the parties and believe that their broader viewpoint will aid this Court in the resolution of this case.

OPINION BELOW

The opinion below is reported at *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998).

STATEMENT OF THE CASE

Students at the University of Wisconsin-Madison were required to pay a student activity fee of $165.75 for the 1995-96 school year. A portion of this fee was allocated by the student government to various politically active groups, including the Wisconsin Public Interest Research Group (WISPIRG); the Lesbian, Gay, Bisexual Campus Center; the UW Greens; the International Socialist Organization; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; and Students of National Organization for Women. Scott Southworth and other students who disagreed with the political and ideological agendas of these organizations sued the university under various theories, including the First Amendment right to refrain from subsidizing these groups' expressive activity.

The district court agreed with the objecting students and found the collection and allocation of mandatory student activity fees violate the First Amendment. On appeal, the Seventh Circuit Court of Appeals affirmed the lower court opinion, emphasizing that politically active groups can continue to speak and act however they wish; *however*, the university cannot force

objecting students to subsidize those activities. *Southworth*, 151 F.3d at 721. The Seventh Circuit's analysis began with the general principles enunciated in *Abood* and *Keller*, and were refined in *Lehnert*. The court below used the three-part *Lehnert* analysis: To be constitutional, the expenditures must be

> (1) "germane" to collective-bargaining activity; (2) justified by the government's vital policy interest in labor peace and avoiding "free-riders;" and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Lehnert, 500 U.S. at 519. The court found the university's practice of compulsory subsidization of political and ideological groups violated all three prongs of this test.

First, the court held that the university could not prevail by claiming that the political and ideological groups funded by the student activity fee are germane to the university's "educational" purpose. *Southworth*, 151 F.3d at 725. The court recognized that "everything is in a sense education[] . . . even if it merely teaches you that you do not want to do it again." *Id.* The court concluded that the political and ideological groups, which are private and open to students and nonstudents alike; which mirror organizations existing outside the university setting; and which have goals primarily concerned with the promotion of their ideological beliefs, are not germane to legitimate university goals. *Id.*

> The mere incantation of the rubric "education" cannot overcome a tactic, repugnant to the Constitution, of requiring objecting students to fund private political and ideological organizations.

Id.

Second, the court held that, even if the university could surmount the "germaneness" hurdle, there is no vital interest in

compelling students to fund private organizations which engage in political and ideological speech. *Id.* at 727. Moreover, the court noted that

> far from *serving* the school's interest in education, forcing objecting students to fund objectionable organizations undermines that interest. In some courses students are likely taught the values of individualism and dissent. Yet despite the objecting students' dissent they must fund organizations promoting opposing views or they don't graduate.

Id. at 728.

Third, the court found that the specific expenditures of the mandatory fee to fund the 18 challenged political and ideological programs significantly added to the burdening of free speech inherent in any compulsory payment of money. It relied on *Lehnert's* holding that using objecting employees' funds to lobby or otherwise garner public support for a position "present[s] additional 'interference with the First Amendment interests of objecting employees.'" *Lehnert*, 500 U.S. at 521-22 (citation omitted). Relying heavily on the political and ideological nature of the challenged programs, the Seventh Circuit held that compulsory funding violated the students' First Amendment rights. *Southworth*, 151 F.3d at 730-31.

The university asked this Court to review the case, and the petition for a writ of certiorari was granted March 29, 1999.

SUMMARY OF ARGUMENT

While the court below correctly decided this case, several aspects of its analysis should be reviewed by this Court. First, the court should have recognized that *Lehnert*, like the agency shop fee and integrated bar cases before it, requires strict scrutiny. Just like any other First Amendment case, courts should apply strict scrutiny to mandatory student activity fees used to subsidize groups engaging in expressive activity.

Students exercising their right to refrain from subsidizing others' expressive activity are entitled to full First Amendment protection. This is so despite the disturbing language in *Buckley v. Valeo* that contributions are entitled to less First Amendment protection than expenditures because someone else is doing the actual talking. Whatever validity that distinction may have had in the context of campaign contributions, certainly the policy rationale for giving contributions less protection (to prevent corruption) is wholly inapplicable when individuals wish to *refrain* from contributing.

Second, the Seventh Circuit opinion unnecessarily emphasized the political and ideological cast of the challenged activities. This Court's decisions in *Abood* and *Glickman v. Wileman Brothers & Elliott*, 117 S. Ct. 2130 (1997), create some confusion on this point, as *Abood* expressly declares that no such political or ideological label is required, but *Glickman* found the lack of such content important. To remedy this inconsistency, this Court should acknowledge that *Glickman* was inconsistent with *Abood* on this point; hold that, to the extent the *Glickman* holding survives, that its emphasis on the lack of political or ideological content to generic fruit advertisements is limited to commercial speech. Alternatively, if the political or ideological content of speech is held to be a necessary precondition to First Amendment protection, then the Court must define those terms so as to provide guidance to both the universities and the lower courts as to the broad scope of activity included within those genres.

Finally, applying strict scrutiny to the University of Wisconsin fee, amici argue that the university does not have a compelling interest to justify the fee in the first place. Moreover, even if the university has a compelling justification for forcing students to subsidize voluntary activity groups, this justification cannot extend to those groups which engage in the activities challenged by the plaintiffs in this case.

ARGUMENT

I

A STATE UNIVERSITY'S INTRUSION ON STUDENTS' FIRST AMENDMENT RIGHTS MUST BE SUBJECTED TO STRICT SCRUTINY

A. Standard First Amendment Analysis Requires Strict Scrutiny

Standard First Amendment analysis follows strict scrutiny, regardless of whether the First Amendment right is positive (one may speak freely) or negative (one may refrain from speaking or refrain from subsidizing others' speech). These two aspects of the free speech guarantee are usually considered to be two sides of the same coin, as this Court taught in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), holding that school children could not be required to salute the American flag. *See also Riley v. National Federation of the Blind*, 487 U.S. 781, 796-97 (1988) ("the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say") (applying strict scrutiny to statute requiring professional fund-raisers to disclose financial and donor information). Moreover, just as compelled silence is constitutionally indistinguishable from compelled speech, so too are compelled statements of fact constitutionally indistinguishable from compelled statements of opinion. *Riley*, 487 U.S. at 797.

Thus, under the usual First Amendment analysis, the presumption of constitutionality gives way to a presumptive prohibition on infringement. *Elrod v. Burns*, 427 U.S. 347, 360 (1976). This is especially true in cases involving political belief and association, which constitute the core of those activities protected by the First Amendment. *Id.* at 356. Encroachment on First Amendment rights may be justified only if they survive strict scrutiny. *Riley*, 487 U.S. at 788 (strict scrutiny is "standard First Amendment analysis"). Such restrictions are

valid only if "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry Education Association v. Perry Local Educators Association, Inc.*, 460 U.S. 37, 45 (1983).

The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of the interest (not on the individual attacking the restriction to show that such an interest does not exist). *Elrod*, 427 U.S. at 362. Even the usual deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). In addition, the means chosen to further the governmental interest must be closely drawn to avoid unnecessary abridgment of First Amendment freedoms. The government has the burden to show that its interest is furthered by a means that is least restrictive of First Amendment rights. *Elrod*, 427 U.S. at 363. *See also Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (limitation on First Amendment rights may be "no greater than is necessary or essential to the protection of the particular governmental interest involved"). In the compelled fee context, then, the government must show its actions are least restrictive of dissenting students' right to withhold financial support from groups' expressive activities.

Although this Court has never ruled specifically on the issue of activities funded by mandatory student fees, cases in the agency shop fee and integrated bar context provide a framework for analyzing the appropriate use of mandatory student fees. In the compelled fees context, there has been some confusion as to whether and how to apply this analysis. The court below noted that the Plaintiffs in this case urged the application of strict scrutiny, but having already found the university violated First Amendment rights using the *Lehnert* analysis, the Seventh Circuit found it unnecessary to apply the more exacting scrutiny. *Southworth*, 151 F.3d at 731 n.13. Actually, the *Lehnert* test appears to be a form of strict scrutiny specifically designed for

agency shop fee cases. This Court's omission in explicitly stating this, however, has led some courts to conclude that lesser scrutiny is sufficient. *See, e.g., Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (9th Cir. 1999) (petition for rehearing pending decision in *Southworth* granted May 3, 1999); Siemer, *Lehnert v. Ferris Faculty Association: Accounting to Financial Core Members: Much A-Dues About Nothing?* 60 Fordham L. Rev. 1057, 1078-79 (1992) (identifying cases where federal courts had trouble applying *Lehnert*). This case presents the opportunity to this Court to state explicitly what its agency shop fee and integrated bar cases have held implicitly: that objectors' First Amendment challenges must be analyzed under strict scrutiny.

B. This Court's Agency Shop Fee Cases Implicitly Require Strict Scrutiny

In *Abood v. Detroit Board of Education*, 431 U.S. at 231, this Court held that

> the fact that [individuals] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.

Abood involved nonunion public school teachers who were compelled to pay an agency shop fee to the teachers' union. The court upheld the requirement for all teachers in a bargaining unit to support the collective bargaining representative, but ruled that the Constitution was violated if nonmembers were compelled to pay for political or ideological activities that were unrelated to collective bargaining, contract administration, and grievance adjustment. *Id.* at 235-36.

These same principles apply to attorneys who are forced, by state law, to belong to and pay dues to a bar association. In *Keller v. State Bar of California*, this Court dismissed arguments that the Bar was not bound by prior case law concerning compelled union dues. The Bar had argued that

the union fee cases should be distinguished from compelled bar dues on the grounds that the Bar assertedly served a more substantial public interest than the union's private economic interest. *Keller*, 496 U.S. at 13. This Court replied that

> legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace, indicates that such arrangements serve substantial public interests as well. We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result here.

Id. (citations omitted). This Court then announced the guiding standard for determining challenges to the Bar's expenditures:

> [W]hether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State."

Id. at 14.

Keller was followed by *Lehnert v. Ferris Faculty Association*, 500 U.S. 507. In that case, a plurality of this Court formulated a three-part test to be used in compulsory fee challenges. This Court ruled that an expenditure is chargeable to dissenters if (1) it is germane to the activity for which compelled fees are permissible; (2) it is justified by the government's vital policy interest that justified the compelled fees; and (3) it does not significantly add to the burdening of free speech already occasioned by the compelled fee. *Id.* at 518.

All of these cases were extremely important vindications of the rights of Americans to refrain from subsidizing speakers who advocate ideas with which they disagree. The facts of the *Lehnert* case in particular demonstrate why these principles must be applied with equal vigor in the mandatory student fee context.

The plaintiffs in *Lehnert* were state college professors who paid agency shop fees to the faculty union. Upon their challenge to the union's practice of using compelled fees for all union activities, including lobbying, this Court held that the professors could not be compelled to subsidize any activities outside the limited scope of contract ratification or implementation, even matters as closely related to the union's interests as taxes for the support of public education. *Lehnert*, 500 U.S. at 520, 526. The symmetry of public university professors and the students they instruct in relation to the same First Amendment rights requires the same vigilance in protecting those rights for both groups.

In 1995, Justice O'Connor noted that lower court decisions applying the *Abood-Keller-Lehnert* line of cases resulted in a split of authority among the lower courts as to whether an objecting student may be forced to pay for political and ideological speech with which they disagree.

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. There currently exists a split in the lower courts as to whether such a challenge would be successful.

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. at 851 (citations omitted) (O'Connor, J., concurring). One of the lower court cases identified by Justice O'Connor is *Smith v. Regents of University of California*, 4 Cal. 4th 843.

Smith involved a challenge by students to the University of California's practice of funding political and ideological groups with mandatory student fees.[2] The California Supreme Court

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[2] At issue in *Smith* were 14 groups, including Amnesty International, Campus Abortion Rights Action League, Spartacus Youth League,

(continued...)

determined that the university's use of compelled student fees to fund political and ideological speech and activities was subject to strict judicial scrutiny. "Because the use of a mandatory fee implicates freedom of association, *strict scrutiny applies*." *Smith*, 4 Cal. 4th at 853 (emphasis added).

On the contrary, in both *Hollingsworth* and *Rounds*, the Ninth Circuit expressly rejected the claim that the use of mandatory fees to fund political and ideological activities is subject to strict scrutiny.

> The district court did not err in declining to apply strict scrutiny to the funding of OSPIRG EF through mandatory fees imposed upon the students at Lane by the Board of Education. As we held in *Rounds*, even if *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny are applicable, they do not endorse the application of strict scrutiny.

Hollingsworth, Memorandum Opinion at 3. *See also Rounds*, 166 F.3d at 1037.

> Because competing constitutional interests are implicated and significant governmental interests impacted, an intermediate level of scrutiny is appropriate, assessing first the interference with First Amendment rights imposed on those objecting to the expenditures and then determining "whether they are nonetheless adequately supported by a governmental interest."

This analysis is incorrect. There are no "competing constitutional interests." Rather, the students have a well-settled constitutional right to refrain from subsidizing political and ideological activities with which they disagree. Whatever

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[2](...continued)
and Students Against Intervention in El Salvador. *Smith*, 4 Cal. 4th at 850.

interest the university asserts is not a *constitutional* interest; it is simply a governmental interest that must rise to the level of "compelling" if it is to survive the first prong of standard First Amendment analysis. This Court should determine that mandatory funding schemes are to be strictly scrutinized (as in *Smith*) instead of subjected to intermediate scrutiny (as in *Rounds* and *Hollingsworth*) or analyzed through the three-pronged test articulated by this Court in *Lehnert (*as in *Southworth)* in favor of strict scrutiny.

C. Strict Scrutiny Should Apply Regardless of Whether the Challenged Programs or Activities Are Labeled "Political" or "Ideological"

The decision of the court below rested heavily on the fact that the 18 challenged programs are easily identified as political or ideological in nature. *Southworth*, 151 F.3d at 730-31. This premise was wholly unnecessary, however, in light of this Court's holding in *Abood* that

> our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels is not entitled to full First Amendment protection. . . . Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

Id. at 231-32. *See Lehnert*, 504 U.S. at 516, 521-22.

> Unions have traditionally aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns. . . . First Amendment protec-

> tion is in no way limited to controversial topics or emotionally charged issues.

See also Buckley v. Valeo, 424 U.S. 1, 14 (1976) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)) (First Amendment protections are not confined to the "exposition of ideas").

This Court's decision in *Glickman v. Wileman Brothers & Elliott*, 117 S. Ct. 2130, however, cast some confusion on this matter. *Glickman* involved a challenge by independent fruit growers who objected to regulations requiring they pay for generic fruit advertising. While the four dissenting justices in that case made it perfectly plain that the First Amendment protects against the government compelling individuals to fund private speech whether or not the speech at issue is political or ideological (117 S. Ct. at 2147 (Souter, J., dissenting)), the rule to be taken from the majority is less clear and to the extent it conflicts with *Abood*, this Court should reaffirm *Abood*. In *Glickman*, the Court upheld the assessment in part because it did not compel the fruit growers to endorse or finance any political or ideological views. *Id.* at 2138. While the court below found this aspect of the regulation to be of the "utmost significance to the Court's ruling" (*Southworth*, 151 F.3d at 730), what actually seems to be of the greatest importance in that case was that the federal government had a longstanding practice of thoroughly regulating this particular field of commerce. *Glickman*, 117 S. Ct. at 2138-39.

> Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, rather than because of any direct contribution to the interchange of ideas.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 779-80 (1976) (Stewart, J., concurring) (internal citation omitted, footnote omitted).

This purported line between commercial and ideological speech, however, is indistinct at best, and more frequently wholly indeterminate. As Justice Brennan noted in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 319-20 (1974) (Brennan, J., dissenting) (a case involving a city's ordinance forbidding political advertisements on buses while permitting other types of advertisements):

> The line between ideological and nonideological speech is impossible to draw with accuracy. By accepting commercial and public service advertisements, the city opened the door to "sometimes controversial or unsettling speech" and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of transporting passengers. In the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements might be to other passengers.

If, however, this Court maintains that, in the commercial context, a challenged activity must have political or ideological content to be subject to strict scrutiny under the First Amendment, the Court should clarify that this holding is applicable in the commercial realm *only*. In the agency shop fee, integrated bar, and student activity fee cases, core First Amendment rights may not be infringed regardless of whether a court labels challenged activities as "political" or "ideological."

Nonetheless, even in agency shop fee and similar cases, and despite *Abood*'s caution to the contrary, courts frequently employ the phrase "political and ideological" to describe the challenged activities in compelled dues cases. This is probably due in large part to the fact that the plaintiffs in these cases often

challenge only those activities which are blatantly political or ideological. *See, e.g., Southworth*, 151 F.3d at 720 (challenging only 18 programs); *Smith*, 4 Cal. 4th at 850 (challenging 14 out of 150 programs)). At least two federal appeals courts flatly contradict *Abood* by requiring proof of political or ideological content before permitting members of an integrated bar to challenge the bar's use of their dues for expressive purposes with which they disagree. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 404-05 (7th Cir. 1996); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 633 (1st Cir. 1990) (approving lobbying on "technical" legislation); *see also Popejoy v. New Mexico Board of Bar Governors*, 887 F. Supp. 1422, 1429-31 (D.N.M. 1995).

If the First Amendment is going to be held to apply only to "political or ideological" activities,[3] however, this Court should provide guidance as to the types of activities these adjectives encompass. As shown below, however, attempting to define "political" and "ideological" demonstrates just how broad those words are; and why *Abood*'s holding that such adjectives are unnecessary makes so much sense. For example, the word "political" covers a wide range of expressive activity; it is not limited to lobbying or campaign contributions.

"One rarely abandons the path of logic and commonsense when Webster is consulted for the precise meaning of a term." *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980). The Second Circuit did just that in *Schwartz v. Romnes*, 495 F.2d 844, 860 n.6 (2d Cir. 1974), quoting from Webster's Third New International Dictionary (1961), the following definitions of "political" and "politics":

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[3] Such a requirement, however, would prove devastating to the values the First Amendment was designed to protect. Political dissent would be easy to suppress if speakers were first required to prove in court that this message met the current definition of "political" or "ideological."

> [P]olitical . . . 1a: of or relating to government, a government, or the conduct of governmental affairs; b: of or relating to matters of government as distinguished from matters of law . . . c: engaged in civil as distinguished from military functions . . . d: of, relating to, or concerned with the making as distinguished from the administration of governmental policy . . . 3a; of, relating to, or concerned with politics; b: of, relating to, or involved in party politics . . .." "politics . . . 1a: the art or science of government: a science dealing with the regulation and control of men living in society: a science concerned with the organization, direction, and administration of political units (as nations or states) in both internal and external affairs: the art of adjusting and ordering relationships between individuals and groups in a political community; b(1): the art or science concerned with guiding or influencing governmental policy . . . 4a(1): political affairs or business; specif: competition between competing interest groups or individuals for power and leadership (2): activities concerned with governing or with influencing or winning and holding control of a government . . . (3): activities concerned with achieving control, advancement, or some other goal in a nongovernmental group (as a club or office) . . ..

Similarly, to determine whether a Chinese national could properly seek asylum because he feared persecution in China for his "political" opinions, the Third Circuit relied on the definition of "political" in Black's Law Dictionary (5th ed. 1979):

> Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as

> political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy . . . .

Chang v. Immigration and Naturalization Service, 119 F.3d 1055, 1069 n.5 (3d Cir. 1997).

In *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 n.11 (D. Or. 1976) (reviewing a school district policy banning "political" speakers at school), the court noted that

> the word "political" itself connotes different things to different people, not excluding judges and editors of dictionaries. . . .
>
> . . . .
>
> Without more, the word political is too vague and its meaning too elusive to tolerate in regulations aimed at protected conduct.

The California Supreme Court (also relying on Webster's) struck down as unconstitutionally vague a statute criminalizing threats made to further social or political purposes in *People v. Mirmirani*, 30 Cal. 3d 375, 384 (1981) (citations omitted):

> "Political" is defined as of or relating to "government," "the conduct of governmental affairs," or "politics." Politics is "the art or science of government," "the regulation and control of men living in society," and the "total complex of interacting and (usually) conflicting relations between men living in society."

Applying this definition, the court went on to say:

> The main problem with the statute is that it is all-inclusive. It is virtually impossible to determine what conduct by an individual in a democratic society could not in some way be construed as an attempt to

> achieve a "social" or "political" goal. At first glance, it might be argued that one who threatened another after a barroom brawl would not be included within the scope of the statute. However, if the brawl started because of a racial epithet and one of the participants hoped to deter members of a certain racial group from coming to that bar, would such threats be made to achieve a goal related to "human society" or to the "conflicting relationships" among men and women in society? Clearly the statute provides no guidance to the police, prosecutor, judge or jury who must decide whether the conduct was motivated by the desire to achieve a social or political goal.
>
> Despite the apparent intent to limit the scope of the statute to threats aimed at achieving "social or political goals," *those words in fact provide no limitation at all. They are all-encompassing.*

Id. (emphasis added).

Specifically in the context of agency shop fees, the District of Columbia Circuit also recognized the broad definition of "political" for purposes of determining whether union expenditures are germane. In *Miller v. Air Line Pilots Association*, 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff'd*, 118 S. Ct. 1761 (1998), the appellate court held:

> The union would have us see its lobbying on safety-related issues as somehow nonpolitical because all pilots share a common concern with these activities. But we cannot possibly assume that to be true. All pilots are surely interested in airline safety, but it would certainly not be unexpected that pilots would have varying views as to the desirability of government regulation--including those regulations of airlines that pertain to safety. The benefits of any regulation include trade-offs, and certain pilots might

> be reluctant to pay the costs either directly or indirectly of increased regulations, just as others might oppose relaxed regulations that could expand work opportunities. Some, of course, might even object to such regulations on principle.

Further confusion and potentially unwarranted limitation on First Amendment rights result when lower courts treat "political" and "ideological" as synonyms. At the very least, lower courts should be aware that the definition of ideological includes all social programs, even those which may lack discernible political content. The common dictionary definition of "ideology" is "the body of ideas reflecting the social needs and aspirations of an individual, group, class, or culture." The American Heritage Dictionary of the English Language at 654 (Morris ed. 1981). Justice Stewart defined "ideological expression" as follows:

> Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought that may shape our concepts of the whole universe of man.

Virginia State Board of Pharmacy, 425 U.S. at 779 (Stewart, J., concurring). Scholars define "ideology" in varying ways, but all stress the social aspect of ideological thought:

- "[A] distinct and broadly coherent structure of values, beliefs, and attitudes with implications for social policy."

A. J. Reichley, *Conservatives in an Age of Change: The Nixon and Ford Administrations* at 3 (1981), *cited in* R. Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* at 36 (1987) (Higgs).

- "[A] collection of ideas that makes explicit that nature of the good community. . . . [T]he framework by which a community defines and applies values."

G. C. Lodge, *The New American Ideology* at 7 (1976), *cited in* Higgs at 36.

- "[A]n economizing device by which individuals come to terms with their environment and are provided with a 'world view' so that the decision-making process is simplified. [It is] . . . inextricably interwoven with moral and ethical judgments about the fairness of the world the individual perceives."

D. C. North, *Structure and Change in Economic History* at 49 (1981), *cited in* Higgs at 36-37.

At a minimum, therefore, "ideological" activities that cannot be funded with compelled fees would include those seeking social change, "good" government, or "fairness" in the way the world operates.

D. *Buckley v. Valeo's* Holding That Monetary Contributions Are Entitled to Less Scrutiny Is Inapplicable When an Individual Asserts His First Amendment Right to Refrain from Subsidizing Another's Speech

The Ninth Circuit decisions in *Rounds* and *Hollingsworth* relied in part on the notion that monetary contributions are entitled to less First Amendment protection because someone else is making the actual speech:

> The challenge in this case does not present an instance of compelled personal speech, for no personal speech is compelled from anyone. . . . For this reason, contrary to the Students' argument, strict scrutiny is not required. When personal speech is compelled, as in *Wooley v. Maynard* and *West Virginia State Board of Education v. Barnette*, state action is valid only if it is "a narrowly tailored means of serving a compelling state interest." *PG&E Company v. Public Utilities Corporation*, 475 U.S. 1,

> 19 (1986). Because mandatory exactions do not involve personal endorsements, such exacting scrutiny is not required.

Rounds, 166 F.3d at 1037-38 and 1038 n.4. To arrive at this holding, the Ninth Circuit misapplied this Court's holding in *Buckley v. Valeo*, 424 U.S. 1.

In *Buckley*, this Court upheld federal statutory limits on campaign contributions. The Court found that the government had a compelling interest in preventing corruption or the appearance of corruption and that the limits were related to this interest. *Buckley*, 424 U.S. at 26. The Court expressly declined to subject these limits to strict scrutiny because "a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. Campaign expenditures, on the other hand, were held to be core political expression fully protected by the First Amendment.

In the first place, this Court should revisit this oft-criticized distinction between the constitutional scrutiny applied to contributions and expenditures.

> We do little but engage in word games unless we recognize that people . . . spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words.

Id. at 244 (Burger, J., concurring in part and dissenting in part). *See also Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring) (the distinction "should have little, if any, weight in reviewing corporate participation in candidate elections"); *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309, 2326 (1996) (Thomas, J.,

concurring and dissenting) ("Contributions and expenditures both involve core First Amendment expression . . . . When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself. Indeed, the individual may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual."). *See also Federal Election Commission* v. *National Conservative Political Action Committee*, 470 U.S. 480, 495 (1985) (where the "proxy" speech is endorsed by those who give, that speech is a fully protected exercise of the donors' associational rights). ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.")

In the second place, the *Buckley* Court held that contributions are entitled to less constitutional protection because of the state's interest in preventing the possibility of corruption or the appearance of corruption. *Buckley*, 424 U.S. at 26. But this justification makes no sense in the reverse case--where a person wishes to exercise his or her right to *refrain* from making a contribution. In this case, and lacking any countervailing compelling state interest, the freedom of speech right is entitled to full First Amendment protection.

II

IN THIS CASE THE UNIVERSITY HAS NO CONSTITUTIONAL JUSTIFICATION TO COMPEL PAYMENT OF FEES TO PROMOTE STUDENT EXPRESSIVE ACTIVITIES

A. The University Has No Compelling Interest in Coercing Students to Subsidize Voluntary Organizations' Political and Ideological Activities

While a university may well have a compelling interest in *exposing* students to various conflicting viewpoints, it does not have a compelling interest in coercing *support* for those viewpoints.

> [T]he freedom to keep silent as well as to speak is grounded in something broader than a national fear of the state. It is equally the product of our view of personhood, which encompasses what the Supreme Court later referred to as "freedom of thought," "freedom of mind" and a "sphere of intellect and spirit." Were there no state at all, or were it inalterably benign, our conception of what it means to be human would still lead us to respect the individual autonomy of intellect and will enshrined in the First Amendment.

Carroll v. Blinken, 957 F.2d 991, 996 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992) (citations omitted). By coercing support for political groups, the university sends a troubling message to students: If students want to advance a political position for which they cannot find support, the government will give them money to propagate their unpopular views. This is an illegitimate lesson for a public university to teach its students.

The defendants in *Abood* and *Keller* understood that mandating support for an organization smothers, rather than stokes, contrary speech. Moreover, the university, let alone the political groups themselves, does not create a free marketplace or forum for the expression of ideas. Rather it requires students to be the financial sponsors of someone else's speech. Indeed, the notion that a free marketplace of ideas can be created and encouraged by involuntary contributions is an oxymoron. The strength of an idea (*i.e.*, its acceptance in the marketplace) is best measured by how many people will volunteer to spread the idea or to help finance its propagation.

The university's position also implies that the First Amendment has only limited application within the confines of a public university campus. As the court below noted,

> far from *serving* the school's interest in education, forcing objecting students to fund objectionable organizations undermines that interest. In some courses students are likely taught the values of individualism and dissent. Yet despite the objecting students' dissent they must fund organizations promoting opposing views or they don't graduate.

Southworth, 151 F.3d at 728. If the university really wants students to learn practical civics lessons, it should encourage politically active groups to learn the art of fund-raising. In real political campaigns, opponents of the message do not give money to the cause.

B. A State University May Permit Voluntary Funding of Student Groups as a Less Intrusive Method of Promoting Such Groups on Campus

Universities are free to adopt any system of funding student activities that avoids constitutional defects. The best system, however, is the "positive check-off" voluntary system. Such a check-off could be designed in a number of ways. For example, it could list each recognized student group eligible for funding and permit students to choose which particular groups they wish to subsidize. Alternatively, it could simply provide a single box which, if checked, would mean that the student assents to funding all eligible student groups. By requiring students to designate affirmatively that they wish to fund particular groups, either individually or as a whole, the university advances several compelling goals. First, it requires thought on the part of the student, rather than mindless contributions to groups the student may not even be able to identify. Second, it encourages student groups to organize and articulate their messages clearly so as to attract as much financial support as possible.[4] Third, and most importantly, it sends a strong message to the entire student body that the university respects the constitutional rights of *all* students and has taken the strongest measures possible to protect those rights. La Fetra, *Recent Developments in Mandatory Student Fee Cases*, 10 J.L. & Pol. 579, 612-13 (1994).

Supporters of compelled funding have derided such a method, complaining that

---

[4] The groups benefit in another way: if they suffer a funding shortfall when their opponents are no longer forced to subsidize their activities, the groups will likely turn to their own members to make up the difference. A person who pays a membership fee to belong to one of these groups will have a more personal stake in the group's successful attainment of its objectives. Bevilacqua, *Public Universities, Mandatory Student Activity Fees, and the First Amendment*, 24 J.L. & Educ. 1, 29-30 (1995).

> funding will soon devolve into a political *popularity* contest. Thus, in a setting where provocative ideas should receive the most support and encouragement, precisely the opposite will occur; student groups will be subject to an ideological referendum, and the most marginal groups will receive the least financial assistance. This is truly Orwellian.

Smith, 4 Cal. 4th at 881 (Arabian, J., dissenting). Justice Arabian's reasoning is backwards. What is Orwellian is a situation in which marginal groups are presented to the community as having support where there is none and presented as mainstream rather than extreme. Giving these ideas the cover of legitimacy and acceptability because of coerced subsidization from students who oppose the message perpetrates a great disservice. Students who wish to attract adherents to unconventional ideas must do so by convincing others of the soundness of their theories. Giving these unconventional thinkers the unwilling financial support of their dissenters grants them the means to speak more loudly than their actual support would permit.

CONCLUSION

The students in *West Virginia State Board of Education v. Barnette*, by being forced to salute the flag, were more than exposed to patriotism; they were forced to support it with a raised hand. Like them, the students at UW-Madison were not simply exposed to divergent views, they were forced to reach into their pockets to finance their opponents views. Ideas that could not win adherence through persuasion and reason were thus kept alive by the state by imposing fees on those who do not support the idea in question. The First Amendment was designed to prevent just such an exercise of state power.

Attempts by the government, whether through a public agency, a legislature, or a court, to force individuals to financially support political and ideological activities with which they

disagree have been rejected from the time of Thomas Jefferson to the present. This Court has on numerous occasions protected the rights of teachers, attorneys, and nonunion agency shop fee payers to refrain from supporting speech which they oppose. Students are entitled to no less protection.

For the reasons expressed above, the decision of the Seventh Circuit Court of Appeals should be affirmed.

DATED: June, 1999.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae

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In The

Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

vs.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF UNITED COUNCIL OF UNIVERSITY OF WISCONSIN STUDENTS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

BELL, GIERHART & MOORE, S.C.

MARK B. HAZELBAKER
Counsel of Record
44 East Mifflin Street
Madison, WI 53701-1807
(608) 257-3764

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

The United Council of University of Wisconsin Student Governments, Inc. (hereinafter "United Council") is the statewide association of the student governments of the campuses of the University of Wisconsin System.[1] United Council respectfully contends that the Seventh Circuit Court of Appeals erred in analyzing the student fee system at issue under the principles of First Amendment law developed in the content of union "fair share" or "agency" fees. University of Wisconsin student governments have a unique role in the governance of University of Wisconsin System institutions as the result of adoption of sec. 36.09(5), Wis. Stats. That statute empowers students to "tax" themselves through fees to finance student services which are approved by the democratic process. As such, student fees in the University of Wisconsin are a form of taxation and government expenditures, not "fair share" fees. The fees, therefore, should be analyzed under the First Amendment. Viewed as a form of taxes and government expenditures established through the student political process, student fees do not violate the First Amendment.

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[1] This brief was drafted in whole by Attorney Mark B. Hazelbaker of Bell, Gierhart & Moore, S.C. No person or entity other than *amicus curiae*, United Counsel of University of Wisconsin Students, Inc. made any monetary contributions to aid in the preparation or submission of this brief.

ARGUMENT

1. INTRODUCTION

This First Amendment case arises in the context of a unique structure of university governance. The issues are critically affected by that context. This Court has recognized that the unique nature of university governance requires a different framework of analysis. In *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980), this Court held that the faculty of Yeshiva University could not form a union. The Court's opinion centered on the faculty's role in running the University through its governance system, finding that the National Labor Relations Act could not be applied in the university context. The Court wrote:

> The [National Labor Relations]Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry. Ibid. In contrast, authority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. See J. Baldridge, *Power and Conflict in the University* 114 (1971). This system of "shared authority" evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves. See N. Fehl, *The Idea of a University in East and West* 36-46 (1962); D. Knowles, *The Evolution of Medieval Thought* 164-168 (1962). At early universities, the faculty were the school. Although faculties have been subject to external control in the United States since colonial times, J. Brubacher & W. Rudy, *Higher Education in Transition: A History of American Colleges and Universities,*

> 1636-1976, pp. 25-30 (3d ed. 1976), traditions of collegiality continue to play a significant role at many universities, including Yeshiva. For these reasons, the Board has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." Syracuse University, 204 N.L.R.B. 641, 643 (1973).

Yeshiva University, 444 U.S. 672, 681, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980).

The principle of the *Yeshiva University* case applies in this case because Wisconsin state law has made students a part of the governance of the University of Wisconsin System and campuses. In the instant case, the Students argue that the collection of the Mandatory Activity Fee as a condition of their matriculation at a State institution and the distribution of a portion of the proceeds to the various student groups compels them to speak in support of beliefs they do not hold and infringes on their freedom to not associate with an organization with which they strongly disagree.

It is well-established that the freedom of speech and association protected by the First Amendment of the United States Constitution includes the freedom to choose "both what to say and what not to say." *Riley v. National Federation for the Blind*, 487 U.S. 781, 797, 108 S.Ct. 2667, 2677, 101 L.Ed.2d 669 (1988); *see also Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Moreover, the United States Supreme Court has held that the First Amendment can be violated when the government compels an individual to subsidize "political

and ideological purposes," with which he or she disagrees. *Lyng v. International Union, United Auto Workers*, 485 U.S. 360, 369, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988), *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 301, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). However, the government does not violate an individual's right to free speech and association every time it collects money from citizens and spends it. For the reasons set forth below, United Council respectfully suggests that both the collection of funds through the mandatory student activity fee, and the dispersement of those funds to student organizations that may or may not be political in nature, is constitutional.

2. THE AUTHORITY OF UNIVERSITY OF WISCONSIN STUDENTS TO IMPOSE AND ALLOCATE SEGREGATED FEES IS AN ADDITIONAL BASIS UPON WHICH THIS COURT CAN CONCLUDE THAT THE UNIVERSITY'S FEE PROGRAM DOES NOT VIOLATE THE FIRST AMENDMENT.

United Council is a statewide association of the student governments at the University of Wisconsin campuses and the community colleges in the University of Wisconsin Center System. United Council advocates the interests of student governments and students in the United States Congress, the Wisconsin Legislature, before the University of Wisconsin Board of Regents (the "Regents"), and in litigation. United Council appears in the matter to supplement, but not to disparage, the argument offered by the Regents. United Council endorses the

analysis offered by the University, and believes the Seventh Circuit Court of Appeals erred in concluding that the segregated fees imposed at the University of Wisconsin-Madison violate the First Amendment.

United Council appears herein as amicus curiae for the purpose of noting an additional basis upon which the United States Supreme Court can reverse the Seventh Circuit Court of Appeals. Because of the unique legal status of student governments allocating fees in the University of Wisconsin system, the fees are essentially a form of taxation. The use of fees, therefore, should be analyzed as are government expenditures, not as "fair share dues" collected by government on behalf of private entities.

A. University of Wisconsin Students Have Been Delegated Plenary Authority Over Segregated Fees By sec. 36.09(5), Wis. Stats.

In 1973, the Wisconsin Legislature merged the former Wisconsin State University system with the former University of Wisconsin. The resulting University of Wisconsin System, created by Chapter 335, laws of 1973, serves a large student population at four-year campuses and a system of two-year centers. University Extension service provides University outreach services as part of the merger process, the Legislature adopted statutory language which balanced the need for accountability of the University as a public institution with the tradition of internal governance that had distinguished the University of Wisconsin system. The result was Section 36.09, Wis. Stats., which allocates responsibilities for various

aspects of the governance of the University system to the various players in the process. Notably for the purposes of this case, subparagraph (5) of that statute conferred unique powers upon students as active partners in institutional governance. The statute provides:

> (5) STUDENTS. The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor, and the faculty shall be active participants in the immediate governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

The significance of sec. 36.09(5) for the operations for the University of Wisconsin Systems soon became evident. In 1976, the Wisconsin Supreme Court decided *Student Assoc. of the University of Wisconsin-Milwaukee v. Baum*, 74 Wis. 2d 283, 246 N.W.2d 622 (1976). In *Baum*, the Wisconsin Supreme Court held that the adoption of sec. 36.09(5) transferred substantial authority to appoint student committee members to allocate University fees, from the chancellor to the students. The Wisconsin Supreme Court rejected Chancellor Baum's contention that he was not required to recognize the appointees of the Student

Government as the student representatives to the Student Fee Allocation Committee. The Supreme Court held that the Student Government was the lawfully constituted representative of the students, and therefore, the party with sole right to exercise the authority of the students under sec. 36.09(5), Wis. Stats. *Baum*, 74 Wis. 2d at 293-294.

The *Baum* opinion includes legislative history of the merger law. *Baum*, 74 Wis. 2d at 298. While the legislative history was cited in the dissent, there is no reason to doubt that the cited report, prepared by the committee which drafted the statute, should be given controlling weight in construing the statute. Most pertinently, that report stated "Students in consultation with the chancellor shall also have responsibility for the disposition of student fees where such fees constitute substantial support for campus student activities such as intra-mural sports, theater, student government, and the like." The study committee characterized students' responsibility for fees as "primary but not exclusive responsibility." *Baum*, 74 Wis. 2d at 298-299 n. 1.

Baum, therefore, held that the statute conferred the exclusive power of selecting student representatives in the allocation process on the student government, and commented that it was a right " . . . which must be free of administrative interference if it is, in reality, to be a right." *Baum*, 74 Wis. 2d at 296.

Thus, as construed by the Wisconsin Supreme Court, sec. 36.09(5), Wis. Stats., delegates to students the primary responsibility for imposing and allocating funds, and evaluating the effectiveness of programs funded by

student fees which principally concern and affect student life. United Council acknowledges that the Board of Regents ultimately impose student segregated fees. However, the Regents also act as the final arbiter of all institutional governance at the University. For example, the Regents confer diplomas upon the University's graduates; these are awarded, however, upon the "nomination of the faculty." Similarly, while the Regents have final authority to adopt student fees and adopt an allocation thereof, the student's role in determination of those fees is preeminent and amounts to effective control.

B. The Defendant Regents Impose Fees At The Behest Of Students Acting As One Element Of Shared Institutional Governance.

When the University of Wisconsin system was created in the merger process, the Legislature recognized that student needs would not be constant. The best persons to determine how to meet the needs of the current generation of students would be the students themselves. Accordingly, the Legislature gave primary authority to determine the funding of services to address contemporary concerns of students to those students themselves. As a result, the democratic process has allowed student segregated fees to be imposed by the student governments, allocated to organizations, and expended to meet needs identified by the students. Delegation to the students of the primary role in the allocation of segregated fees is a practical recognition of the fact that students are best aware of what students' interests and needs require.

Therefore, the imposition of allocable segregated fees by the University, done at the behest of student governments and their segregated fee committees, is really one element of the shared governance system which operates the University of Wisconsin system. In that system, the Regents are the final arbiter, but the faculty, the chancellors, system administration, and the students all play significant roles. Each of these actors have certain responsibilities in which their authority is primary. Each must exercise their primary authority with attention to the secondary interests of the others. The amalgamation of these interests, and roles, governs the University of Wisconsin. It is a dynamic, creative process which has allowed the University of Wisconsin to continue to offer excellent education, while meeting the needs of the constantly changing student body.

C. The University of Wisconsin-Madison, and its Board of Regents Act as a State Agency.

Under Wisconsin law the University of Wisconsin-Madison, and its Board of Regents, is an arm or agency of the state. *See*, Ch. 36, Wis. Stats., *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 19, 72 N.W.2d 577 (Wis. 1955); *Board of Regents of University of Wisconsin System v. Mussallem*, 94 Wis.2d 657, 669, 289 N.W.2d 801 (1980) ("The University of Wisconsin Madison, an arm of the state, is a member of the University of Wisconsin System . . . "). Moreover, courts in multiple jurisdictions have held that a university and its officers, including its Board of Regents, is an arm of the state, much akin to a state agency. *Boyett v. Troy State University*, 971 F.Supp. 1403, 1410 (M.D. Ala.

1997), *aff.*, 142 F.3d 1284 (11th Cir. 1998), *reh. en banc denied*, 152 F.3d 937 (11th Cir. 1998), *cert. denied*, 142 L.Ed. 661, 119 S.Ct. 799 (1999); *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992), *Stevens v. Thames*, 204 Ala. 487, 488, 86 So. 77 (Ala. 1920); *Cox v. Board of Trustees of the University of Alabama*, 161 Ala. 639, 648, 49 So. 814 (Ala. 1909); *Ingraham v. Wright*, 525 F.2d 909, 912 (5th Cir. 1976), *cert. denied*, 421 U.S. 952 (1976); *Blanton v. State University of New York*, 489 F.2d 377, 382 (2nd Cir. 1973).

D. The Student Activity Fee Scheme Should Be Analyzed as a Tax for First Amendment Purposes.

The Seventh Circuit Court of Appeals, relying on *Rosenberger v. University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), held that the activity fee scheme utilized by the Board of Regents at the University of Wisconsin could not be viewed as the appropriation of public funds through taxation. *Southworth v. Grebe*, 157 F.3d, 732 (7th Cir. 1998) (Rovner, J. dissenting), *petition for cert. granted*, (U.S. March 29, 1999) United Council respectfully suggests that the Court of Appeals' interpretation of *Rosenberger* with respect to whether the student activity fee equaled a tax is misplaced.

In *Rosenberger*, this Court emphasized that the student activity fee, with its goal of opening a forum for speech and recognizing the diversity and creativity of students was quite different from an impermissible tax in aid of sectarian religion. *Rosenberger*, 515 U.S. at 841. Thus, the majority opinion focused upon whether the activity fee scheme served as an appropriation that

directly and specifically aided religion, not whether the fee, in general, could be equated with a tax.

The fee scheme in the instant case is very much like a tax, in that the university, acting as an arm of the state, compels all University of Wisconsin-Madison students to pay the fee. *Id.* at 873 (Souter, J., dissenting). Admittedly, the Rosenberger court analyzed the student fee exaction under the Establishment/Free Exercise Clause of the First Amendment. However, the holding is relevant to the instant case, which arises under the Free Speech and Association clause. The analysis should be no different here, since the funding methods used by the University of Virginia in *Rosenberger* and the University of Wisconsin in the instant case are essentially the same. In neither instance do the objecting plaintiffs have the right to opt out of funding governmental services with which they disagree.

In *Erzinger v. The Regents of the University of California*, 137 Cal.App.3d 389, 187 Cal.Rptr. 164 (Cal. Ct. App. 1982), *cert. denied*, 463 U.S. 1133, 77 L.Ed.2d 1368, 103 S.Ct. 3114 (1983), the court upheld a policy at the University of California which funded health services including abortion services and pregnancy related counseling through mandatory student fees. The plaintiffs contended that the policy violated their First Amendment rights in that it forced the students to subsidize a practice they found repulsive and a violation of their religious beliefs. *See id.* at 391.

The court disagreed, likening the collection of the mandatory student fees to a tax and holding that the University, as an extension of state government had the

authority to spend the money as it saw fit: "The right to free exercise of religion does not justify refusal to pay taxes." *Id.* at 393. The court continued: "the superior court properly found 'as a matter of law the Regents have the legal authority to assess mandatory student fees and utilize those fees for the benefit of its student population. . . . " *Id.* at 393-94. *Erzinger* was followed in federal court by *Goerhing v. Brophy*, 94 F.3d 1294, 1302 (9th Cir. 1996), *cert. denied, Goehring v. Del Junco*, 520 U.S. 1156, 137 L.Ed 495, 117 S.Ct. 1335 (1997).

The Supreme Court of New Hampshire reached a similar conclusion in *Wuelper v. University of New Hampshire*, 112 N.H. 471, 298 A.2d 747 (N.H. 1972). In *Wuelper*, students objected to the University of New Hampshire's decision to use funds obtained from its mandatory student activity fee to pay the costs of speeches to be given at the university by the "Chicago Three." *See id.* at 472. The students claimed that funding the speeches through the activity fee violated their rights of free political association. *See id.* Although the court dismissed the case because it did not present a claim which would justify a declaratory judgment, the New Hampshire court considered the student activity fee a tax. *See id.* at 478.

3. THE INSTANT CASE SHOULD BE ANALYZED UNDER THE DOCTRINE OF "GOVERNMENT SPEECH."

The government does not violate the First Amendment in all situations where it compels an individual to subsidize speech. In fact, this Court has emphasized that there is considerable latitude for government speech. *See*

Kamenshine, *Reflections on Coerced Expression*, 34 Land & Water L. Rev. 101, 103 (1999); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. at 833. According to *Rosenberger*, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Id.* The "government speech" doctrine tells us that "a governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donations, or other sources for any purposes within its authority. *Keller v. State Bar of California*, 496 U.S. 1, 17, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). This is especially true within the context of the state university system. Indeed, within that context, "government (in this case the Board of Regents authorizing the collection of the activity fee and the student government that distributes the proceeds to student organizations) may abridge incidentally individual rights of free speech and association when engaged in furthering the constitutional goal of 'uninhibited robust and wide-open expression.' " *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983), *quoting New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964), *see generally Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (certain incidental infringements of rights of association constitutional in context of federal campaign finance statute tailored ultimately to enhance openness of political discussion and activity).

A. The Test for Government Speech is Rational Relationship to a Legitimate Governmental End.

Since the government must speak in order to govern, it may use tax revenues such as student fees and tuition for speech activities "rationally related to a legitimate governmental objective." *See generally Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547-48, 76 L.Ed.2d 129, 103 S.Ct. 1997 (1983). Labeling the legitimate governmental objective "political or ideological" does not alter the way in which a court must analyze such a case. *See generally, American Party of Texas v. White*, 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974); *Common Cause v. Bolger*, 574 F.Supp. 672 (D.C. 1982), *aff.*, 461 U.S. 911, 77 L.Ed.2d 744, 94 S.Ct. 1296 (1974). Simply put, so long as the government bases its actions on legitimate goals, "government may speak despite citizen disagreement with the content of its message." *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033, 1050 (5th Cir. 1982) (Rubin, J., concurring); *cert. denied*, 460 U.S. 1023, 75 L.Ed.2d 495, 103 S.Ct. 1274 (1983).

In *FCC v. League of Women Voters of California*, 468 U.S. 385, 82 L.Ed.2d 278, 104 S.Ct. 3106 (1984), this court conceded that almost every legislative appropriation would, to some extent, involve a use to which some taxpayers may object. "Nevertheless," this Court noted, "this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures." 468 U.S. at 385 n. 16; *see also Pacific Gas and Electric Co. v. California P.U.C.*, 475 U.S. 1, 24 n. 3, 89 L.Ed.2d 1, 106 S.Ct. 903 (1986) (Marshall, J. concurring).

B. The Fee Scheme Utilized by the University of Wisconsin-Madison is Rationally Related to A Legitimate Governmental End.

The premise that the purpose of a university, especially a state-funded, public university is to foster and increase the overall exchange of information, ideas, and opinions on the campus is not a strange concept in jurisprudence involving the efficacy of mandatory student fees and the organizations and publications they support. *See Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) ("the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.' "); *Windmar v. Vincent*, 454 U.S. 263, 267 n. 5, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603, 87 S.Ct. 269, 70 L.Ed.2d 629 (1967); *Southworth v. Grebe*, 157 F.3d, 1124, 1125 (Rovner, J. dissenting) (Numerous courts have recognized that the free expression of a wide range of ideas is central to the educational mission of a university, teaching students to think for themselves and to separate the 'wheat from the chaff' ").

Because the instant case clearly implicates the "government speech" doctrine, and because the fee scheme utilized by the University of Wisconsin-Madison is rationally related to further a legitimate governmental end, United Counsel respectfully suggests that this court should reverse the judgment of the Seventh Circuit Court of Appeals.

4. ANALYSIS UNDER *ABOOD-KELLER* IS IMPROPER.

The students contend, and the Seventh Circuit Court of Appeals found, that the student fees collected by the University of Wisconsin-Madison, were analogous to the union and state bar dues analyzed by the Court in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (Stewart, J., plurality opinion), and *Keller v. State Bar*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). United Council respectfully suggests that while there may exist a "substantial analogy" between the relationship of a state bar government and its members and the relationship between unions and their members, the student governments and University system have nothing in common with unions and state bars imposing "fair share dues," collected under the mandate of the government. In the case of "fair share dues," a citizen is forced by law to transfer income from the party who earns it to a union or organization. In essence, the government compels a private individual to transfer money to another non-governmental organization.

In this case, the student governments are acting as a part of the government, not as a private voluntary association outside of the government which has been able to induce the government to use its coercive power to impose and collect fees on its behalf. Because the student share part of the institutional governance of the University of Wisconsin, the students' decisions, made in the student political process, to adopt and impose student fees, and allocate them to the services deemed appropriate, are part of a *governmental* process, *not an associational* one.

Moreover, the fact that the University of Wisconsin-Madison, endeavors to foster a "marketplace of ideas" through its collection and distribution of student fees further separates the instant case from "fair share" fee cases such as *Abood* and *Keller*. In *Abood*, the plaintiffs contended that they had no control over the union's communications, and that the communications the union engaged in were one-sided presentations of the 'Union viewpoint.' "The mandatory fees in *Abood*, therefore, enhanced the power of one, and only one, ideological group to further its political goals." *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032, 1038 (9th Cir. 1999). In contrast, the student activity fee and funding process at the University of Wisconsin-Madison "increases the overall exchange of information, ideas and opinions on the campus." *Id*. In addition, university students, unlike union or integrated bar members, did not specifically pay their fees to the groups in question. Instead, students paid the fee to the student government, which, in turn used the money for its own activities and for the support of well over 100 student organizations. *Southworth*, 157 F.3d at 1125. Thus, contrary to union and state bar activities, "the speech of the offending groups can hardly be attributed to the student government, which funds groups of radically different views." *Id*. That being the case, the First Amendment burden that demanded protection for objecting dues shop or state bar members in *Abood* and *Keller*, "simply has no precise counterpart in the very different student fee context." O'Neil, *Student Fees and Student Rights: Evolving Constitutional Principles*, Journal of College and University Law, Winter, 1999. Because the fee scheme in the instant case

has nothing in common with the "fair share" dues found in *Abood* and *Keller*, United Council suggests that in analyzing the student fees at issue, the fees should be analyzed as governmental appropriations, not as fees exacted by government by the behest of a non-governmental association. Under that analysis, the "governmental speech," not the *Abood-Keller* standards, apply.

To allow students to opt out of financing the government on the grounds that they disagree with the object of the government's action is not a vindication of their First Amendment rights. Rather, it is a destruction of the rule of the majority. It is unacceptable to allow taxpayers, in this case, fee payers, to decide which services they wish to support and which they do not. That would erode majority ruling and leave an atomistic, ungovernable situation.

Finally, we point out that construing student fees as the government appropriations they were intended by the Legislature to be, fulfills the Legislature's purpose of allowing students to assure that their needs, as today's generation of students, are met. The world, though it may stay the same in some ways, is always changing. Students today confront issues unheard of by their predecessors just 20 years ago. Section 36.09(5), Wis. Stats., empowers students to identify needs that are immediate to them, but of which the administration may be totally unaware. It provides an element of responsiveness, while involving an authority which encourages responsibility.

For the reasons stated in this argument, United Council respectfully urges this Court to find that the student fee allocation program constitutes "government

speech," and that as such, the University Board of Regents have great discretion in collecting fees and distributing them.

CONCLUSION

The United Council of University of Wisconsin Student Governments, Inc., respectfully requests that the United States Supreme Court reverse the decision of the Seventh Circuit Court of Appeals and remand the case with directions that judgment be entered dismissing the complaint.

Dated this 10th day of June, 1999.

Respectfully submitted,

BELL, GIERHART & MOORE, S.C.

MARK B. HAZELBAKER
State Bar No. 1010302
Attorney for United
Council of University of
Wisconsin Students, Inc.
With Johnathan McCaskill,
Law Clerk

Address:

P.O. Box 1807
Madison, WI 53701-1807
(608) 257-3764

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IN THE

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Petitioners,

v.

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Respondents.

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN COLLEGE PERSONNEL ASSOCIATION, ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES, ASSOCIATION OF AMERICAN UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS, NAWE: ADVANCING WOMEN IN HIGHER EDUCATION, AND THE COLLEGE BOARD IN SUPPORT OF PETITIONERS

Of Counsel:
SHELDON E. STEINBACH
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle
Washington, D.C. 20036
(202) 939-9355

STEPHEN S. DUNHAM *
RENATA K. BAUMAN
MORRISON & FOERSTER LLP
370 17th Street, #5200
Denver, Colorado 80202
(303) 592-1500

LEONARD M. NIEHOFF
BUTZEL LONG, P.C.
Suite 300
350 South Main Street
Ann Arbor, MI 48104-2131
(734) 995-3110
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.

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INTEREST OF *AMICI CURIAE*

The American Council on Education ("ACE") is a non-profit national educational association founded in 1918. ACE's membership includes approximately 1,800 public and private colleges, universities, and educational organizations throughout the United States. As a leading participant in higher education affairs, ACE seeks to promote the interests of all members of the academic community—students, faculty, administration, and the institutions themselves. ACE participates as an *amicus curiae* only on rare occasions when a case presents issues of substantial importance to higher education in the United States. This is such a case.[1]

The remaining *amici* on this brief are: the American Association of Community Colleges, which represents 1,100 two-year institutions; the American Association of State Colleges and Universities, which represents over 370 state colleges and universities, sponsors research, and publishes reports on higher education; the American College Personnel Association, which represents over 6,500 college and university student affairs professionals; the Association of American Colleges and Universities, which represents over 650 public and private colleges and universities with the purpose of improving liberal education; the Association of American Universities, which represents 62 major research universities; the National Association of State Universities and Land-Grant Colleges, which represents over 170 public research universities; the National Association of Student Financial Aid Administrators, which represents over 3,200 postsecondary institutions, individuals, agencies and students and seeks to promote effective administration of student financial aid; NAWE: Advancing Women in Higher Education, which serves administrators, faculty and students, plus leaders from associations, business, and government agencies with the purpose of advancing women in higher education and related fields; and The College Board, which represents over 3,300 colleges and universities, secondary schools, university and school systems, and education associations and agencies and seeks to maintain academic standards and to broaden access to higher education.

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that those attorneys listed on this brief authored the brief in whole. No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief *amicus curiae*. Letters of consent as required by Supreme Court Rule 37.3 are appropriately filed with the Clerk of this Court.

The freedom of universities to define and pursue their educational mission is of vital concern to *amici*. Fundamental to that mission is the ability of a university to create on its campus a "marketplace of ideas"—exposing students to diverse views, offering opportunities for robust debate, and allowing presented truths to compete for understanding and acceptance. This marketplace includes not only the classroom but also many other aspects of university life, including participation in student government and student activity groups. By funding these groups through student fees, universities create an on-campus forum for the expression of a wide range of viewpoints on a variety of issues.

This Court has granted certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998) ("*Southworth I*"), and has certified as the question before it "[w]hether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech."

Board of Regents of the Univ. of Wis. v. Southworth, 119 S. Ct. 1332, 1332 (1999). This issue is of great concern to the many public universities that collect some type of mandatory student fee and is therefore of great concern to *amici*.

Amici request that this Court answer the question certified in the negative and reverse the decision below for the following three reasons.

First, a university's use of mandatory fees to create a fund that provides support on a neutral basis to a broad array of different organizations does not offend the First Amendment. This funding does not compel speech or association connected with any particular viewpoint. Instead, the mandatory fees collected by the University of Wisconsin merely create a forum for the expression of diverse perspectives.

Second, even if this use of fees does rise to the level of compelled speech or association, it does not run afoul of the First Amendment. Support of a student activity fund, and of the organizations that ultimately receive support from the fund, is germane to a university's effort to further its educational mission by fostering and sustaining a marketplace of ideas.

Finally, requiring universities to distinguish "political" from "non-political" or "ideological" from "non-ideological" organizations, and to discriminate in funding based upon these distinctions, would compel universities to engage in conduct that is, at best, impracticable, and, at worst, unconstitutional.

ARGUMENT

I. A UNIVERSITY'S USE OF COMPULSORY FEES TO CREATE A STUDENT ACTIVITY FUND SHOULD BE ANALYZED AS THE CREATION OF A FORUM, RATHER THAN AS COMPELLED SPEECH AND ASSOCIATION

A. A University, as a Marketplace of Ideas, Has a Compelling Interest in Promoting the Presence of a Diversity of Viewpoints

"'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.'" *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quotation omitted). A university can provide this atmosphere only by offering an environment in which a rich diversity of ideas, values, and perspectives is championed and challenged. In this sense, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Keyishian v. Board of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967)).

This marketplace trains future citizens and leaders by providing "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.N.Y. 1943)). If a university is to provide such training, some members of the academic community will inevitably encounter speech that they find unfamiliar, even abhorrent. Furthermore, learning to tolerate and respond to such speech is an important part of the educational process. "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open dis-

course towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

The marketplace extends beyond the classroom to extracurricular activities, which are "a critical aspect of campus life." *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring). Education involves more than tests, textbooks, lectures, and libraries. Fundamentally, it is about the development of character.[2] Consequently, education does not end at the classroom door, but permeates campus and university life. As this Court recognizes, a "great deal of learning occurs informally." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 n.48 (1978) (opinion of Powell, J.) (quoting William J. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). Indeed, since the nineteenth century, extracurricular activities have played an increasingly significant role in advancing the core mission of universities:

> Over time . . . extracurricular programs have come to be seen not merely as useful services but as an integral part of the educational process itself. Educators point to the dangers of a college that stresses only learning and cognitive skills while ignoring opportunities for students to engage in cooperative activities in which each relies on the efforts of others and is relied upon by others in return. . . . More and more, [extracurricular activities] are regarded not only as a source of enjoyment but as ideal experiences for learning to cooperate and take responsibility for the welfare of one's peers.
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> . . . .

[2] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 863, 112 Stat. 1581, 1826 (Congress recognizes that "the development of virtue and moral character, those habits of mind, heart, and spirit that help young people to know, desire, and do what is right, has historically been a primary mission of colleges and universities . . . .").

> . . . The contemporary college or university does not concentrate only on formal education; it assumes the larger responsibility of promoting human development in all its forms.

Derek C. Bok, *Higher Learning* 51-52 (1986); *see also* Frederick Rudolph, *The American College & University: A History* 136-55 (1990) (describing the increasing significance of extracurricular activities in the history of American colleges and universities). In sum, "[t]he work of a university cannot . . . be measured strictly in terms of courses, curricula, and examinations. Dewey wrote, 'The only way to prepare for social life is to engage in social life.'" *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 526 (Cal. 1993) (Arabian, J., dissenting) (quotation omitted).

Numerous lower courts recognize that education extends beyond the classroom and that a university's educational mission therefore includes the funding of campus activities, such as student groups and newspapers. *See, e.g., Carroll v. Blinken*, 957 F.2d 991, 1000 (2d Cir. 1992) (recognizing the "quite common vision of the university as more than the sum of classes in its course catalog—as a sort of sanctuary where young adults grow in a myriad of ways," and upholding the use of mandatory fees to fund a public interest research organization); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983) (upholding student funding of a university newspaper); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.) (upholding the use of mandatory student fees to subsidize a school newspaper), *aff'd*, 478 F.2d 1407 (8th Cir. 1973). Lower courts have acknowledged the important educational interests advanced by student groups, including "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate." *Carroll*, 957 F.2d at 1001.

In sum, colleges and universities hold a unique position in our society and pursue a correspondingly unique mission. Their business is to provide "that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). This mission can be achieved only by fostering a marketplace of ideas on campus and by ensuring that the resultant diversity of thoughts and perspectives informs the full range of experiences—from course selections to lecture series to student organizations. If a university is barred from this essential business, it cannot prepare its students "to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee*, 505 U.S. at 590.

B. Consistent with the First Amendment, a University Can Use Mandatory Fees to Fund a Neutral Forum that Helps Support a Diverse Variety of Organizations

In holding that the University of Wisconsin violated the First Amendment, the Seventh Circuit relies upon cases such as *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). Those cases, however, involve neither the special mission of higher education nor university funding of a neutral forum. Rather, those cases address direct and compulsory funding of *specific* organizations—a union in *Abood*, and a state bar in *Keller*—that took positions on political and ideological issues. For First Amendment purposes, the distinction is critical. The importance of this distinction was underscored by the three judges who dissented from the denial of rehearing *en banc* in this case. *See Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) ("*Southworth II*") (Rovner, J., dissenting). As the *Southworth II* dissenters recognized, in *Abood* and *Keller* the recipients of the funds themselves

engaged in the challenged speech. In those cases, "the private groups were funded because of their political and ideological positions, and for the purpose of furthering those positions. Therefore, the speech presented by those groups was attributable to the union and the bar association." *Southworth II*, 157 F.3d at 1126.

In contrast, students at the University of Wisconsin (and many other colleges and universities) pay fees not to particular groups but to the student government, which then uses the money to fund a wide array of organizations in a viewpoint-neutral manner.[3] "The speech of the offending groups can hardly be attributed to the student government, which funds groups of radically different views." *Id.* at 1125. "[T]he student government has not aligned itself with any political or ideological viewpoint. It does not fund the groups because of their political or ideological speech, and no one even suggests that the speech engaged in by those groups can be attributed to the student government itself." *Id.* at 1126; *see also Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1037-38 (9th Cir. 1999) ("[T]he challenge in this case does not present an instance of compelled personal speech, for no personal speech is compelled from anyone. No student is required to 'confess by word or act' belief in any message . . . .") (quotation omitted); Kari Thoe, Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities*, 82 Minn. L. Rev. 1425, 1445 (1998) ("While union and bar dues are used to

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[3] The only exception to this procedure may be Wisconsin PIRG, for which funding is authorized by direct student referendum. (Pet'r Pet. Writ Cert. at 6.) This brief does not address the separate and different issue raised by this direct funding, although the "germaneness" analysis discussed below would apply to this funding as well.

fund the voice of one entity—the union or bar association, respectively—the student fees are used to fund a public forum.").

The University of Wisconsin simply requires its students to support a neutral forum, just as if it "built a large auditorium and held it open for everyone." *Southworth II*, 157 F.3d at 1129 (Wood., J., dissenting). The fact that this case concerns a fund, rather than a physical space like an auditorium or an amphitheater, does not mean that forum analysis does not apply. To the contrary, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), this Court recognizes that, although a student activity fund "is a forum more in a metaphysical than in a spatial or geographic sense," nevertheless "the same principles are applicable." *Id.* at 830.

Application of these principles makes clear that a critical difference exists between (a) supporting a forum and (b) supporting the speakers that ultimately use that forum. Thus, in *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court rejected a university's argument that if it were to allow religious groups to use its buildings it would create an impression that it endorsed religion in violation of the Establishment Clause: "[B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there." *Id.* at 272 n.10.[4] A student compelled to pay a restoration fee for a university amphitheater can hardly complain that her First

[4] *See also* Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 Yale L.J. 2009, 2017 (1994) ("[T]he lack of content-based standards . . . enables the system to support a legitimate campus forum, and this in turn creates a distance between those who fund the forum and any particular view expressed within it, thus avoiding unconstitutional forced speech.").

Amendment rights are violated because she disagrees with some of the speakers who appear there. She has no greater constitutional cause to complain of a content-neutral student activity fund because she disagrees with some of the organizations it ultimately supports.

If a forum supports organizations in a truly neutral fashion, as is stipulated here, (Pet. App. 106a, ¶ 12), and thereby funds groups that take radically differing positions on the same issues, it cannot be said to endorse or promote any particular group or any specific position. *See* Robert M. O'Neil, *Student Fees and Student Rights: Evolving Constitutional Principles*, 25 J.C. & U.L. 569, 574 (1999) ("As for the funded groups . . . the inescapable variety—indeed cacophony—of their publicly expressed views avoids any plausible inference or attribution of sponsorship on the part of any individual dues payer."). Neutral funding of student groups creates a neutral forum; it does not constitute endorsement or promotion. *See Widmar*, 454 U.S. at 272 n.10 ("Undoubtedly many views are advocated in the forum with which the University desires no association.").

It is true that the funds at issue here ultimately find their way to organizations that engage in political and ideological activities. As the *Southworth II* dissenters observed, however, "[t]he chain of custody of the funds cannot itself be enough to raise a constitutional issue." *Southworth II*, 157 F.3d at 1126 (Rovner, J., dissenting). If the "chain of custody" were to suffice, endless constitutional absurdities would follow. Students could challenge tuition payments that supported research, faculty appointments, class topics, or lectures with which they philosophically disagreed. *See id.* at 1126, 1128. This result would destroy public education and the use of public fora of all kinds to support discussion of issues of public interest and concern.

C. The Cases Cited By the Court Below Do Not Support the Proposition that this Case Should Be Analyzed Under the Standards of *Abood-Keller* Rather Than Under the Standards of Forum Creation

According to the court below, the analysis set forth by this Court in *Abood* and *Keller* applies in this case. *See Southworth I*, 151 F.3d at 722-23. In so holding, *Southworth I* points to some dicta in *Rosenberger* that refers to *Abood* and *Keller*. *See Southworth I*, 151 F.3d at 722. *Amici* respectfully submit that the court below attached excessive significance to this passing reference and too little to *Rosenberger's* unequivocal declaration that it was not addressing the question now presented.

The court below further stated that, "[n]ot only does *Rosenberger* direct us to *Abood* and *Keller*, but every other circuit to have considered the constitutional uses of mandatory student activity fees has applied [this] analysis (although the circuits are split on how exactly the analysis applies)." *Southworth I*, 151 F.3d at 723. Although the cases cited do refer to *Abood* and *Keller*, unlike *Southworth I*, they also recognize the important difference between mandatory funding of a neutral forum and mandatory funding of an organization that itself engages in political or ideological activity. For example, *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985), strikes down a university's use of mandatory fees to fund a public interest group separately listed on students' bills, but distinguishes that situation from one in which student groups compete for their fair share of contributions from an "activity fund."

In sum, because of the unique mission of universities in our society, the particular nature and purpose of student activity funds in assisting universities to achieve that mission, and the neutral role of the student government

in distributing the fees, forum analysis rather than *Abood-Keller* analysis applies here.

II. EVEN IF A UNIVERSITY'S USE OF MANDATORY FEES TO FUND STUDENT GOVERNMENT AND ORGANIZATIONS IS ANALYZED UNDER *ABOOD-KELLER* AS COMPELLED SPEECH AND ASSOCIATION, RATHER THAN AS THE CREATION OF A NEUTRAL FORUM, SUCH A USE OF FEES DOES NOT VIOLATE THE FIRST AMENDMENT

The court below holds that the question presented by the use of fees is "whether the challenged activity is germane to the government's asserted interest." *Southworth I*, 151 F.3d at 724.[5] The court acknowledges the interest articulated by the University. "[F]unding private organizations which engage in political and ideological activities is germane to education because the funding allows for more diverse expression and this in turn is educational." *Id. Southworth I* concludes, however, that " 'germaneness' cannot be read so broadly as to justify the compelled funding of private organizations which engage in political and ideological advocacy, activities and speech." *Id.*

Amici submit that this conclusion is flawed in two significant respects. First, *Southworth I* wrongly assumes that the breadth of a university's educational mission is analogous to the breadth of a union's interest in collective bargaining (*Abood*) or a state bar's interest in regulating the legal profession (*Keller*). *See Southworth I*, 151 F.3d at 725. Second, the court fails to grant an appropriate level of deference to the University's judgment

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[5] *Southworth I* goes beyond the germaneness test of *Abood* and *Keller* to apply the three-prong test adopted by a plurality in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). *See Southworth I*, 151 F.3d 717, 724 (7th Cir. 1998). The reasons stated here to distinguish *Abood* and *Keller* distinguish *Lehnert* as well.

about the nature of its educational mission and the best ways to advance that mission.

A. The Challenged Use of Mandatory Fees Is Germane to a University's Broad Educational Mission, Including Its Interests in Promoting Diverse Expression and in Providing a Marketplace of Ideas

Abood and *Keller* involve contexts very different from colleges and universities. *Keller* holds that compulsory state bar dues cannot be used to finance ideological activities unrelated to the purposes of the compelled association—regulation of the legal profession and improvement of legal services. Similarly, *Abood* holds that a union may not use a dissenting individual's dues to fund ideological activities not germane to collective bargaining. The purposes of the State Bar in *Keller*, to supervise attorney conduct, and of the union shop in *Abood*, to negotiate contracts, are relatively narrow and definable. The educational mission of a university is substantially broader. *See Rounds*, 166 F.3d at 1039 ("The goals of the university are much broader than the goals of a labor union or a state bar, and they are inextricably connected with the underlying policies of the First Amendment.").[6]

It is the business of a university to create a marketplace of ideas, exposing its students to a broad range of viewpoints on many issues, including the political and the ideological. This happens in classrooms—in courses in history, literature, political science, sociology, philos-

[6] *See also* William Walsh, Comment, *Smith v. Regents of the University of California: The Marketplace is Closed*, 21 J.C. & U.L. 405, 423 (1994) ("[T]he organizations' purposes in *Keller* and *Abood* were much narrower than the university's purpose. It is much easier to see something as 'political' or 'ideological,' and therefore ineligible for funding, because it is unrelated to collective bargaining, than it is to distinguish the same from an 'educational mission.' ").

ophy, and many other disciplines. It happens in auditoriums—when guest lecturers speak on ethics, contemporary problems, civil rights, and the like. And it happens in extracurricular activities—in connection with student government, student newspapers, and student organizations identical to those at issue here. Neither state bars nor unions—nor perhaps any institutions other than American colleges and universities—have this broad mission and mandate.

As a result, numerous courts recognize that a university's mission unquestionably reaches the funding of student organizations. Thus, the Second Circuit holds that a university may allocate student activity fees to a group with whose speech some students disagree. *See Carroll v. Blinken*, 957 F.2d 991, 992 (2d Cir. 1992). *Carroll* recognizes three distinct university interests served by the compulsory fee: "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate." *Id.* at 1001; *see also Hollingsworth v. Lane Community College*, No. 97-35451, 1999 U.S. App. LEXIS 5391, at *2 (9th Cir. Mar. 24, 1999) (finding that the mandatory fee scheme is supported by substantial governmental interests in "promoting extracurricular activities, teaching specific skills and instilling civic activism, and creating a forum for vigorous debate and free exchange of ideas" and finding that the fund is "germane" to those purposes within the meaning of *Keller* and *Abood*); *cf. Smith v. Regents of the Univ. of Cal.*, 65 Cal. Rptr. 2d 813, 818-19 (Cal. Ct. App. 1997) (recognizing that participation in the university student senate "teaches specific leadership and advocacy skills . . . and provides a campus forum for vigorous discussion on matters of campus and public concern").[7]

[7] For a helpful discussion of the history of this case, see O'Neil, *supra*, at 575-77.

Southworth I errs by construing narrowly the breadth of a university's educational mission.

B. Courts Should Afford Universities Wide Latitude to Determine Whether the Use of Student Fees Is Germane to Their Educational Mission

Amici respectfully submit that the court below failed to give proper deference to the University of Wisconsin's decision that the use of mandatory fees advances its educational mission. Universities have interests in academic freedom that are a special concern of the First Amendment. This freedom is lost if courts do not afford universities discretion to define the contours of their educational mission and to determine the most effective means of achieving it. Judicial intervention in academic decision-making affects not only the academic freedom of the university, but it results as well in a loss of the freedom of the students, faculty, and other members of the academic community, all of whom participate in and help to create the marketplace of ideas.

For these reasons, this Court has recognized that government intervention in the intellectual life of a university is to be avoided. *See, e.g., Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring). Universities are "characterized by the spirit of free inquiry," and academic freedom gives the university the ability "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 262-63; *see also Keyishian*, 385 U.S. at 602-03; *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (reaffirming the principle of "restrained judicial review of the substance of academic decisions" and noting judicial "reluctance to trench on the prerogatives of state and local educational institutions"). Lower courts follow this authority and stress

their reluctance to second-guess university judgments on such matters. *See, e.g., Carroll*, 957 F.2d at 999 ("[A]cademic freedom . . . would not long survive in any meaningful way if courts were to take upon the task of micromanaging the everyday affairs of our nation's colleges."); *Rounds*, 166 F.3d at 1039 ("[A] university's determination that an organization contributes to the university community is presumptively valid.").

In this case, the University of Wisconsin—a campus with a rich history of the "robust exchange of ideas," *Keyishian*, 385 U.S. at 603—made a judgment that funding a forum that supports a wide variety of student groups, including some engaged in political and ideological activities, plays an important role in its educational mission. This decision deserves respect, "breathing room," and some significant measure of deference. *Southworth I* improperly limited the University's academic freedom to decide how its students "shall be taught," *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring), to decide how "to provide that atmosphere which is most conducive to speculation, experiment and creation," *id.*, and to decide how to provide the "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian*, 385 U.S. at 603 (quotation omitted).

III. FORCING THE UNIVERSITY TO DISTINGUISH BETWEEN "EDUCATIONAL" ORGANIZATIONS AND "POLITICAL" OR "IDEOLOGICAL" ORGANIZATIONS RISKS VIOLATING STUDENTS' FIRST AMENDMENT RIGHTS

The court below effectively requires universities to distinguish political from non-political, and ideological from non-ideological organizations, and then to grant or withhold funding based upon these distinctions. Such distinc-

tions may be constitutionally workable in the context of the activities of a union or a state bar, where the government has a narrower interest and where that interest does not include exposure to a diverse marketplace of ideas. Such distinctions emphatically do not work in the context of a university, however, where the government has a broad interest, and where that interest includes exposure to various political and ideological perspectives. Further, in the context of university campus activities, such distinctions not only fail to work, but they actually create significant constitutional mischief.

Consider a student debate club that sponsors a public forum on presidential impeachment; or a student economic society that hosts a series of speakers on tax reform; or a student group that distributes leaflets asserting that a university discriminates because it hires too few minority professors; or a film society that sponsors a film concerning the events at Tiananmen Square; or an environmental organization that presents a series of lectures on the impact of logging; or a literary studies club that funds a panel discussion of alternative theories of literary criticism, including Marxist, feminist, deconstructionist, and Freudian approaches. At some point it simply becomes impossible to separate the ideological and political from the educational and informative. *See Smith*, 844 P.2d at 524-25 (Arabian, J., dissenting).

Furthermore, a university that attempts to make such distinctions, and then to make funding decisions based upon them, may run afoul of First Amendment prohibitions against content- and viewpoint-based discrimination. In other words, forcing universities to draw these lines does not avoid constitutional difficulties; it compounds them. The University of Wisconsin uses the mandatory activity fee to create a public forum that distributes fees on a content-neutral basis. (Pet. App. 106a, ¶ 12.) By

supporting groups without regard to the content or viewpoint of their speech, the forum detaches funding decisions from endorsement or condemnation of the political or ideological positions of the different organizations. In contrast, the holding of the *Southworth I* court, which would require the University to refuse funding for groups that are too ideological or political, violates the rule against content and viewpoint discrimination in a public forum.

Viewpoint discrimination is obvious when a university treats organizations differently because of their specific orientation or message, for example by electing to fund the Young Republicans but not the Young Democrats. But constitutional problems also may arise when a university treats organizations differently because they approach issues from a political viewpoint. For example, in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), this Court holds that it "discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except for those dealing with the subject from a religious standpoint." *Id.* at 384-85. A speaker may not be denied access to a forum "to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 385; *see also Rosenberger*, 515 U.S. at 893-94.

Just as a university cannot provide less favorable treatment to organizations that have a "religious" viewpoint, so a university cannot provide less favorable treatment to organizations that have a "political" viewpoint. For example, if two groups that address women's issues exist, a campus Women's Studies Club that discusses but does not advocate political positions, and a campus National Organization for Women ("N.O.W.") that takes positions

on public policy, funding the former but not the latter may impermissibly discriminate against N.O.W. on the basis of its political viewpoint.

Faced with a project that calls upon them to do the impossible, with the knowledge that in the effort they might also do the unconstitutional, many universities will respond by funding no student organizations at all or only those that seem to pose no risk whatsoever.[8] As the dissenting judges in *Southworth II* cautioned, such a requirement may "spell the end, as a practical matter, to the long tradition of student-managed activities on these campuses." 157 F.3d at 1127 (Wood, J., dissenting). As funding fails, and as organizations disband, some voices—including, in all likelihood, the most provocative and stimulating, if also the least popular voices—will no longer be heard at our universities. The marketplace of ideas on our campuses will suffer immeasurably.

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[8] An "opt-out/refund" procedure might address certain constitutional concerns, *see O'Neil*, *supra*, at 575, 578, and use of such a procedure certainly should not be foreclosed by this Court. For the reasons set forth in this brief, however, such a procedure should not be required to save the constitutionality of mandatory fees.

CONCLUSION

For all of the above reasons, *amici* respectfully urge that this Court reverse the decision of the Seventh Circuit.

Respectfully submitted,

Of Counsel:
SHELDON E. STEINBACH
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle
Washington, D.C. 20036
(202) 939-9355

STEPHEN S. DUNHAM *
RENATA K. BAUMAN
MORRISON & FOERSTER LLP
370 17th Street, #5200
Denver, Colorado 80202
(303) 592-1500

LEONARD M. NIEHOFF
BUTZEL LONG, P.C.
Suite 300
350 South Main Street
Ann Arbor, MI 48104-2131
(734) 995-3110
Counsel for Amici Curiae

* Counsel of Record

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BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM, *et al.*,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICI CURIAE WISCONSIN STUDENT PUBLIC INTEREST RESEARCH GROUP, ASSOCIATED STUDENTS OF MADISON, AND OTHER INTERESTED STUDENT ORGANIZATIONS

DANIEL H. SQUIRE
Counsel of Record
STUART F. DELERY
CRAIG GOLDBLATT
FRANCISCO MEDINA
MICHAEL D. LEFFEL*
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Attorneys for Amici Curiae

*Admitted only in Wisconsin

June 14, 1999

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No. 98-1189

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM, *et al.*,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

BRIEF OF AMICI CURIAE WISCONSIN STUDENT PUBLIC INTEREST RESEARCH GROUP, ASSOCIATED STUDENTS OF MADISON, AND OTHER INTERESTED STUDENT ORGANIZATIONS

This case presents the question whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech. It is not. Indeed, just the opposite is true: As this Court has repeatedly recognized, public universities further First Amendment principles by bringing together diverse groups of students and fostering the free and open exchange of ideas.

INTEREST OF AMICI CURIAE

This brief is filed on behalf of the Associated Students of Madison ("ASM"), the Wisconsin Student Public Interest Research Group ("WISPIRG"), and 119 other student organizations (see Appendix for complete listing of organizations) with a direct stake in the outcome of this litigation.[1/]

Amicus ASM is the student government at the University of Wisconsin at Madison, which is empowered under Wisconsin Statutes Section 36.09(5) to control the fees about which respondents complain.[2/] ASM, its constituent committees, and its agents are principally responsible for distribution of the collected fees on a viewpoint-neutral basis to some 150 registered student organizations at the Madison campus. ASM plays a vital role, therefore, in the creation and maintenance of the fee system, which provides educational and extracurricular opportunities to students and a broad

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1/ Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that the brief was drafted in its entirety by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae, their members, or their counsel.

2/ Wisconsin's statutes mandate that "the students of each institution or campus . . . shall have primary responsibility for the formulation and review of policies concerning student life, services, and interests." Wis. Stat. § 36.09(5) (1992). In accordance with that mandate, the ASM decides how to allocate the funds collected from the University's student activity fees. *Id.* The University's Board of Regents, however, reviews the ASM's allocation of those funds, and the Regents have final authority to determine whether those allocations comport with the University's educational mission. *Id.*; *see also Southworth v. Grebe*, 151 F.3d 717, 720 (7th Cir. 1998). In addition, contrary to any suggestion by the Court in *Southworth*, 151 F.3d at 720, the referendum demonstrating support for WISPIRG is not binding on the ASM or the Board of Regents.

range of services to the greater University of Wisconsin at Madison community. ASM is representative of the type of student governance structures at other University of Wisconsin campuses.

Amicus WISPIRG and the other amici are registered student organizations at the University of Wisconsin's Madison, Milwaukee, Oshkosh, and Platteville campuses, funded in whole or in part by mandatory fees at issue in this case. These organizations represent broad and diverse viewpoints on a range of educational, cultural, social, political, and pre-professional issues, and they are integral to the presentation, discussion, and debate of issues and ideas on the University of Wisconsin campuses. Collectively, they represent thousands of participating students within the University of Wisconsin System. Each of these organizations, as well, provides co-curricular and extra-curricular educational opportunities to students. Some, like WISPIRG, offer opportunities for students to earn course credit while gaining important real-world skills outside the classroom. During the semester most recently completed, Spring 1999, over 60 students enrolled in such course credit internships. By encouraging discussion and debate of issues on campus, and by encouraging students to become involved in activities outside the classroom, these registered student organizations facilitate participatory civics training and encourage learning by doing. The contributions made by student organizations to the University System's mission lie at the heart of its commitment to service learning.

SUMMARY OF ARGUMENT

In considering the constitutionality of the University of Wisconsin-Madison's student activity fee, the United States Court of Appeals for the Seventh Circuit should have recognized both the vital role our nation's universities and colleges play in educating an informed, participatory

citizenry, and the special role accorded these institutions by this Court. Instead, the Court of Appeals narrowly interpreted the purpose of post-secondary education and neglected this Court's ample precedent to the contrary.[3/]

At its heart, the Court of Appeals opinion rests on a theory that university students may never be compelled to fund the "propagation of opinions" with which they disagree. That approach to the First Amendment, however, undermines the public policy of the State of Wisconsin, destroys the significant educational benefits flowing from our nation's public universities and colleges, and rejects a litany of Supreme Court precedent upholding both the value of education and the importance of freely exchanging ideas in that setting. Quite simply, the Seventh Circuit opinion provides no constitutional basis for distinguishing between a university lecture by a professor with a particular viewpoint and funding a student group that speaks out on a political issue. Both activities provide educational benefits to

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[3/] The Seventh Circuit's opinion also conflicts with the holding of every other Court of Appeals that has considered the constitutionality of funding mechanisms similar to those at issue here. *See, e.g.*, *Hollingsworth v. Lane Community College*, 173 F.3d 860 (table), No. 97-35451, 1999 WL 173574 (9th Cir. Mar. 24, 1999) (upholding use of student activity fees to fund public interest research group); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999) (upholding use of student activity fees used to fund eighty university organizations, including athletic, culturally-oriented, and political groups, and public interest research group); *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) (upholding use of student activity fees used to fund educational, cultural, recreational organizations, and public interest research group); *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) (same); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) (upholding use of student activity fees used to fund student newspaper); *Veed v. Schwartzkopf*, 478 F.2d 1407 (8th Cir. 1973), *aff'g* 353 F. Supp. 149 (D. Neb. 1973) (upholding use of student activity fees used to fund student newspaper, student association, and speaking program).

students, both are funded with moneys collected from students, and both fulfill an important governmental interest in educating an informed and active citizenry.

The court below reached the wrong result by misapplying the holding of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny. Those cases hold that a public institution (or institution acting pursuant to governmental authority) may use its members' money to support speech germane to a significant governmental interest. The State of Wisconsin has a significant, if not compelling, interest in providing a post-secondary education that trains its students to be informed and active citizens. Through the content-neutral funding of the student groups in question, Wisconsin creates a limited, but open, public forum which is germane to its interest and, indeed, nurtures "[a] tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rectors & Visitors of the Univ. of Virginia*, 515 U.S. 819, 835 (1995).

Moreover, the *Abood* line of cases does not even apply where, as here, the government is engaging in a traditional function — providing a post-secondary education — and is using its funds to further that goal. It is well recognized that there can be no legitimate objection to the government's use of funds to subsidize speech incidental to a traditional governmental function.

The Court of Appeals also erred by characterizing the issue as one of compelled speech. The nexus between the objecting students' funding of the limited public forum at the University and the student groups' speech does not mean that these students are being unconstitutionally compelled to speak in support of the groups in question. To the contrary, placing limits on the funding of certain groups in the forum, based on the content of their speech, would be constitutionally impermissible. The severe limitation

imposed by the Court of Appeals regarding the method for spending or returning the objecting students' fees will inevitably lead to a form of impermissible prior restraint or evisceration of the benefits of the forum altogether.

For all these reasons, the Court of Appeals' judgment should be reversed.

ARGUMENT

I. A Public University May, Consistent with the First Amendment, Use Mandatory Student Fees to Support a Public Forum for the Diverse Expression of Political or Ideological Ideas.

This Court has repeatedly held that the First Amendment does not limit a public institution's use of funds collected from its individual members — even to support causes with which some of those members may disagree — when the use of those funds is germane to the institution's purpose. Creating an environment that encourages the free and open expression of ideas is germane to the University of Wisconsin's purpose, as is its collection and disbursement of student fees to that end. Indeed, a number of this Court's opinions extolling the value of "academic freedom" emphasize that encouraging the broad expression of diverse views is central to a university's mission. That principle controls here.

A. *The Abood Doctrine Is Satisfied As Long As The Use Of The Mandatory Fee Is Germane To A Legitimate Governmental Purpose.*

A line of this Court's decisions stands for the proposition that a government entity (or an entity acting pursuant to governmental authority) may use its members' funds to support speech activities — even ideological or political activities with which some of its members may disagree — when that speech is germane to the entity's legitimate public

purpose. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Under these cases, courts must first determine whether there exists a significant governmental interest in the activity at issue. If such an interest exists, the court must then determine whether particular expenditures are relevant to that interest.

The Court in *Abood* addressed an "agency-shop" agreement between a union and a government employer. A Michigan labor statute required all employees to pay the union a "service fee" equal to union membership dues, whether or not they joined the union. The Court recognized that the union's use of the mandatory fee raised First Amendment concerns, even when these fees were used to pay for union activities germane to collective bargaining. "An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." *Abood*, 431 U.S. at 222. For example, an employee's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan." *Id.* Or an employee "might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class." *Id.* But even so, the Court concluded, "such interference [with dissenting employees' First Amendment interests] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.*[4]

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[4] The Court's decision in *Abood* relied, in part, on two previous decisions interpreting the Railway Labor Act. In *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), the Court held that the RLA permitted the use of members' dues to support collective bargaining

(continued...)

With regard to union activities unrelated to collective bargaining, however, the employees' constitutional concerns became paramount. The First Amendment, the Court held, barred the union from using mandatory fees to support political speech with which employees disagreed, if that speech was not germane to collective bargaining. *Id.* at 235-36. The issue for the Court was not whether the speech could be characterized as political or ideological, but whether it was germane to the union's statutory purpose.

In *Keller*, a unanimous Court reaffirmed *Abood*'s germaneness test and applied it to integrated state bar associations. California required attorneys licensed to practice law there to join the State Bar of California, an organization created under state law to regulate the legal profession. *Keller*, 496 U.S. at 4-5. Applying *Abood*, the Court held that "the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (citation omitted). Mandatory fees could thus be spent "for activities connected with disciplining members of the Bar or proposing ethical codes for the profession," but not "to endorse or advance a gun control or nuclear weapons freeze initiative," issues not germane to the State Bar's legal purpose. *Id.* at 15-16.

4/ (...continued)
activity, but said that "a different problem would be presented" if the union funds were used for purposes "not germane to collective bargaining." *Id.* at 235. That "different problem" was presented in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), in which the Court construed the RLA to deny the union the authority to spend dissenting members' funds to support causes to which those employees object.

Following on the heels of *Keller*, the Court in *Lehnert* addressed another First Amendment challenge to the Michigan labor statute that was at issue in *Abood*, this time considering whether a series of specific expenditures were germane to the collective bargaining purpose of a teachers' union. *Lehnert*, 500 U.S. at 519. The Court found that the local union could charge objecting employees for their pro rata share of the costs associated with the activities of the state and national affiliates — even where those activities did not directly benefit the local members — as long as the expenses were otherwise germane to the union's collective bargaining role. *Id.* at 522. Accordingly, the Court permitted the union to charge employees for expenses such as those incurred through the participation of local delegates in the state or national union conventions, where bargaining strategies were discussed. *Id.* at 530.[5/]

B. *Funding Student Groups To Support A Forum For The Diverse Expression Of Ideas Is Germane To the Significant Governmental Interest In Providing Post-Secondary Education.*

Creating an environment that encourages free, robust, and wide-open discussion and debate is not only germane to the mission of institutions of higher education; it is essential. And the funding of a broad array of student groups on a

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5/ More recently, the Court has recognized in the context of commercial speech, rather than political or ideological speech, the ability of government entities to compel the funding of speech when it is germane to a legitimate governmental interest. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, ---, 117 S. Ct. 2130, 2140 (1997). In *Wileman Bros. & Elliott,* even the dissent recognized that *Abood* stands for the proposition that if the government has "important[] and legitima[te]" interests, it may be permissible to have "incidental infringements of the [objecting member"] interests in unfettered speech and association." *Id.* at 2145-46 (Souter, J., dissenting).

content-neutral basis is certainly germane to fostering such an open forum.

1. *The State of Wisconsin has a significant governmental interest in providing post-secondary education.*

The Court has repeatedly recognized the government's special role as educator. That "special role" stems from the government's obligation to prepare "individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Indeed, the "Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs." *Board of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring). It is for this reason the Court recognized in its landmark desegregation decisions that an education that encourages students to "engage in discussions and exchange views with other students," *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950), is "the very foundation of good citizenship," *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

Recognizing the importance of post-secondary education, Wisconsin has adopted what is referred to as the "Wisconsin Idea," the concept that "[t]he boundaries of the university are the boundaries of the state."[6] The Wisconsin Idea is reflected in the legislature's mission statement for the University of Wisconsin System:

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[6] The author of this quote is unknown, although former President of the University of Wisconsin Charles R. Van Hise and former Dean of Extension Louis Reber "made similar remarks. Robert H. Foss, [a] former editor of the University's Press Bureau, . . . has claimed credit for the expression, but his claim cannot be verified." Jack Stark, *The Wisconsin Idea: The University's Service to the State*, *in* State of Wisconsin Blue Book 1995-1996, at 101-02 (1995 Joint Comm. on Legisl. Organization, Wisconsin Legislature).

> The mission of the [University of Wisconsin] system is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional, and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. Basic to every purpose of the system is the search for truth.

Wis. Stat. § 36.01(2) (1992). Like other public colleges and universities, the University of Wisconsin lays the foundation for good citizenship by creating an environment that encourages civic engagement and the free and open discussion of ideas.

2. *The content-neutral funding of hundreds of student groups is germane to the University's interest in providing a post-secondary education.*

The parties stipulated in the district court that the "process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion." Pet. for Cert. at 106a. The germaneness inquiry must therefore address whether Wisconsin's funding of these student organizations of diverse political, cultural, ideological, and religious affiliations is germane to the legitimate governmental purpose of providing post-secondary education.

Perhaps more than any other institutions in our society, our colleges and universities serve as the meeting grounds for the airing of diverse viewpoints and the focal point for spirited, intellectual debate. The legitimacy of the

governmental interest in providing an open forum for the expression of diverse views resonates in several of the Court's recent decisions involving the application of the First Amendment to institutions of higher education. In *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995), for example, the Court held that the exclusion of a particular viewpoint from campus debate would not only violate the First Amendment's free speech guarantee, but would undermine the very purpose of education. In the university setting, the Court explained, the government "acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger,* 515 U.S. at 836. Encouraging "free speech and creative inquiry" improves the educational experience on our nation's campuses, which are "vital centers for the Nation's intellectual life." *Id.*

The question that divided the Court in *Rosenberger* was how to reconcile the First Amendment's prohibition on viewpoint discrimination with the line of Establishment Clause cases that bar direct state funding of sectarian religious activities. *Id.* at 847 (O'Connor, J., concurring). The Court's rationale for concluding that a university *could* fund a religious publication from student fees without violating the Establishment Clause was that the context of the funding — a university's broad commitment to the expression of a diverse range of ideas — should have made clear that the University of Virginia was not endorsing the religious message of the publication that received the funds. Justice Kennedy's opinion for the Court emphasized that the University's funding of the religious publication at issue did not endorse its religious teachings; the University's important interest was in realizing the academic benefits that derived from a diverse forum for expressing ideas, of which the

religious publication was but one of many.[7] The student activity fee reflected "the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." *Id.* at 840. And in citing *Healy v. James*, 408 U.S. 169, 180-181 (1972), the *Rosenberger* Court reaffirmed the principle that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[8]

Indeed, the Court has a longstanding intolerance for any limitations on open forums in the university context. Limitations on open and spirited debate on our campuses "impose a strait jacket upon the intellectual leaders in our colleges and universities that would imperil the future of our Nation." *Keyishian v. Board of Regents,* 385 U.S. 589, 603, 605-606 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). Further, "the Nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Id.* (citations and brackets omitted); *see also Sweezy*, 354 U.S. at 263 ("A university is characterized by the

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[7] Likewise, Justice O'Connor explained in her concurring opinion, "[t]he widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University." *Id.* at 850 (O'Connor, J., concurring).

[8] The special treatment accorded universities is also evident in *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Court upheld the government's ability to withhold federal funding from healthcare providers that counseled abortion as a family-planning method. The Court pointed out that in the university context such conditions on funding might nonetheless violate the First Amendment because "the university is a traditional sphere of free expression so fundamental to the functioning of our society." *Id.* at 200.

spirit of free inquiry, its ideal being the ideal of Socrates — 'to follow the argument wherever it leads.' . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.").

As Justice Powell wrote in his controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), universities have a need to create an environment on our nation's campuses that will foster the "robust exchange of ideas." *Id.* at 313. Quoting an article by William Bowen that discussed the admissions policies of Princeton University, Justice Powell observed that a "great deal of learning occurs informally. It occurs through interactions among students . . . who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Id.* at 313 n.48 (citing William Bowen, *Admission and Relevance of Race*, Princeton Alumni Weekly, Sept. 26, 1977, at 9).

Contrary to these precedents, the Court of Appeals erroneously insisted on a narrow definition of educational purpose. Specifically, the court rejected the argument advanced by the University that "funding private organizations which engage in political and ideological activities is germane to education because the funding allows for more diverse expression and this in turn is educational," *Southworth*, 151 F.3d at 724, scoffing that "everything is in a sense educational," *id.* at 725. The Court of Appeals' narrow definition of germaneness, however, conflicts with this Court's recognition of the broad purposes of post-secondary education in decisions such as *Healy* (universities properly endeavor to create an open "marketplace of ideas"), 408 U.S. at 181, and, most recently, *Rosenberger* (recognizing that "student life in its many dimensions includes the *necessity* of

wide-ranging speech and inquiry"), 515 U.S. at 840 (emphasis added).

Apart from simply pronouncing that "germaneness cannot be read so broadly," *Southworth*, 151 F.3d at 724, the Court of Appeals has not provided any rationale to dispute that the groups funded by the student fee, whether they be political or ideological[9] or merely social, further the State of Wisconsin's legitimate interests in post-secondary education. As the Second Circuit noted in upholding a similar funding mechanism in *Carroll v. Blinken*, 957 F.2d 991, 1001 (2d Cir. 1992), funding of such an open forum promotes "extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate [and] together [such interests] are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech." That is to say, the funding of a broad array of student groups is germane to the University's purpose.

3. *The Court of Appeals improperly applied the standards in Lehnert.*

In addition to its narrow interpretation of germaneness, the Court of Appeals relied on two other standards articulated by this Court in *Lehnert*: that the activities "be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and . . . not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. Even if these additional standards were applicable in the university setting, however, the Seventh Circuit erred in applying them here.

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[9] Although groups may engage in political or ideological speech, the Board of Regents strictly prohibits the use of student fees for partisan political activity. *See* University of Wisconsin System Board of Regents Financial Policy & Procedures Paper No. 20 (June 8, 1987).

With respect to the first standard, the Court of Appeals acknowledged that "there may be a common cause in education and shared governance," but nonetheless found that the standard was not met because "there is no common cause between private organizations which engage in political and ideological speech and the objecting students." *Southworth*, 151 F.3d at 728. In *Lehnert*, the key issue was whether the programs "further[ed the] cause of harmonious industrial relations." 500 U.S. at 521. The analogy in the university context, however, is not whether the objecting students share a common cause with every goal of the groups in question. *But see Southworth*, 151 F.3d at 728. The appropriate analogy is whether funding these groups furthers the government's vital interest in educating an informed and productive citizenry. The Wisconsin legislature, the governing administrators for the University of Wisconsin System, and this Court in other cases, have concluded that the funding of diverse student activities does further this interest.

The Court of Appeals also improperly applied *Lehnert*'s free-rider analysis. The court below suggested that no free-rider problem exists because (1) non-students are permitted to participate in and benefit from the activities funded from the student fees, and (2) the organizations funded with these fees have no obligation to represent the objecting students' views. *Southworth*, 151 F.3d at 728. Neither reason is persuasive. First, the concern about free riders is not abated merely because some non-students may benefit from any particular program. A proper free-rider analysis would treat the limited public forum at issue here like any other public good, such as a public park in Madison. Even if that public park were occasionally used by nonresidents, the free-rider problem associated with creating and maintaining a public good that benefits all of Madison's residents would still exist. Second, the entire student body — including the objecting students —

benefits from the robust exchange of ideas and the diversity of viewpoints that these student groups bring to the campus, whether or not these groups represent the views of objecting students. *Cf. Bakke*, 438 U.S. at 312 (Powell, J.) (noting that a diversity of backgrounds and viewpoints add to the "'speculation, experiment and creation' . . . essential to the quality of higher education").

With respect to the second standard, the Seventh Circuit found that even if funding student groups is germane to, and justified by, the public interest in education, it "significantly add[s] to the burdening of free speech that is inherent" in the context of a university community. 151 F.3d at 729. Once again, however, the court misapplied the *Lehnert* test. *Lehnert* recognized that a certain degree of "burdening of free speech . . . is inherent in the allowance of an agency or union shop," 500 U.S. at 519, but found that requiring objecting, nonunion members to support "lobbying and electoral speech" created a burden that went significantly beyond that inherent burden, *id.* at 521. The Seventh Circuit, in conclusory fashion and without any factual foundation, found that supporting political or ideological speech by the student groups must likewise create a significant burden on the objecting students. The burden on objecting students, however, is no more significant than the burden on their speech inherent in their inclusion in the university community. When their student fees indirectly support a speaker on campus that they might object to, there is no greater burden on these students' First Amendment interests than follows from their payment of tuition used to support a host of other university programs with which they may disagree. Using mandatory student fees to support student groups in a viewpoint-neutral fashion entails no more "significant burden" than they otherwise confront in choosing to be a student at a public university.

4. *Any attempted distinction between "political or ideological" speech and other speech is illusory.*

The Seventh Circuit's analysis also relies on the erroneous assumption that "political or ideological" speech can be easily distinguished from other types of speech. Although the court took pains to point out that respondents are objecting only to "political or ideological" activities[10/] of certain groups and not, for example, to student newspapers or the campus lecture series programs, *Southworth*, 151 F.3d at 721, affirmance of the decision below could wreak havoc with virtually all student activities funded by student fees.

Under the Court of Appeals' decision, public college and university administrators would be forced to decide on a case-by-case basis, possibly depending on who objects, whether a group's activities are "political" or "ideological." Even if school administrators determined that a particular group's activities were not "political" or "ideological," additional questions could be raised when that group invited a speaker to campus or included an article or editorial in its publication; speakers on campus frequently have a political message and

10/ To the extent the objecting students suggest that lobbying activities are somehow more egregious than other forms of "political or ideological" speech by these groups, it is a distinction without constitutional significance. First, it is not clear how in a constitutional context a court can differentiate between lobbying and other political speech. Administrators on campuses across the country, and undoubtedly the courts, would be forced to consider when comments become "lobbying" as opposed to educational or merely "political," but somehow short of lobbying. Second, the objecting students are not compelled to support speech any more or less when that "political" speech is made on the University of Wisconsin-Madison campus rather than a mere mile away at the State Capitol. Groups engaged in "lobbying" provide students with real-life civic experiences and train students to work with and oversee professionals. They are upholding the Wisconsin Idea that the University and its students should be giving something back to the State by using their educational experiences to foster societal improvements.

student publications often contain political editorials. And virtually all student organizations — student newspapers and campus lecture series programs included — could be subject to the same type of review. The Seventh Circuit does not reference any, and there is no, constitutionally significant distinction between this broad range of activities and the activities the objecting students challenge here.

Furthermore, having the University determine whether every student activity is "political" or "ideological" would involve the University in precisely the type of review function based on speech content that the First Amendment prohibits. *See Rosenberger*, 515 U.S. at 828-29, 835 ("The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them.").[11/] Because the school administrators' decisions could be questioned, the courts inevitably would become embroiled in this process of reviewing student activities, with the inherent danger of imposing a "strait jacket upon the intellectual leaders in our colleges and universities [that] would imperil the future of our Nation." *Sweezy*, 354 U.S. at 250; *see also Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (expressing a "reluctance to trench on the prerogatives of state and local educational institutions"). It is one thing for a court to determine whether particular

11/ Indeed, the process for applying for funds might require each would-be recipient to make a prior showing to the University that its speech would be non-ideological or non-political, in effect setting up a prior restraint on access to the "metaphysical forum" created by the student activity fees. Such a prior restraint would itself be unconstitutional. *See Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (fee schedule for parade permits that required administrator to examine "the content of the message" to be conveyed was unconstitutional); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-60 (1975).

speech or activities are germane to a specific purpose such as collective bargaining (*Abood* and *Lehnert*) or advancing the legal profession (*Keller*). It is quite another thing for a court to involve itself in determining whether particular student activities are political or ideological. The latter would be unworkable, would stifle the open marketplace of ideas on our nation's campuses, and has no constitutional basis.

II. The First Amendment Permits the University, as a Governmental Entity, to Fund Speech Without Regard to Individual Objections.

For the reasons described above, the University of Wisconsin-Madison's distribution of funds collected from student fees satisfies *Abood's* germaneness test. Whether that test is satisfied or not, however, *Abood* and its progeny are properly applied only to non-governmental organizations (such as unions in *Abood* and *Lehnert*, and a state bar association in *Keller*), and not to a public university engaging in governmental functions.

The Court consistently has held that the First Amendment is not violated when the government uses tax revenues to subsidize speech incidental to "normal governmental functions," even though particular taxpayers may object to the message that the government chooses to fund. When the government engages in speech itself, or when it pays other organizations or individuals to speak on its behalf, government need not restrict itself to funding only those messages with which every taxpayer agrees. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1992); *National Endowment for the Arts v. Finley*, 524 U.S. 569, ---, 118 S. Ct. 2168, 2179 (1998); *cf. United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs.").

Indeed, although Justice Powell concurred with the Court's opinion in *Abood* because he believed that the First Amendment required broader opt-out rights for individual employees, he nonetheless recognized that government in general — and government-funded educational institutions in particular — need not provide opt-out rights when engaged in traditional governmental activities: "Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). In *Keller*, the Court followed Justice Powell's rationale and explicitly found *Abood* inapplicable to governmental entities when they are engaged in traditional governmental activities, *i.e.*, "the typical government official or agency." *Keller*, 496 U.S. at 12. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Id.* at 12-13.

There can be no doubt that public education is a traditional governmental activity. The Court has long recognized government's important role in providing an education to prepare "individuals for participation as citizens" and to preserve "the values on which our society rests." *Ambach*, 441 U.S. at 76; *see also Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 87 (1907) ("Education is one of the purposes for which what is called the police power may be exercised.") (Holmes, J.). The speech-related decisions of a public educational institution — decisions such as "a university selecting a commencement speaker . . . or a public school prescribing its curriculum" — may not be attacked by those who object to the ideas expressed, even though their tax dollars or tuition moneys are

being used to fund the speech they find objectionable. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, ---, 118 S. Ct. 1633, 1639 (1998).

Further, the student activity fee at issue here is no different from the tax revenue or tuition that the University of Wisconsin uses to fund all of its other expenditures, including faculty salaries, course offerings, lecturers, and speakers.[12/] And while some students "undoubtedly find the viewpoints of some faculty members, expressed either in the classroom or in scholarship, to be offensive," and while these viewpoints are subsidized through tuition and tax dollars, "[t]he First Amendment surely does not mandate that researchers be funded on consenting-student-by-consenting-student basis on the theory that tuition is a compelled subsidy of these researchers' speech." *Southworth*, 157 F.3d 1124, 1128 (7th Cir. 1998) (D. Wood, J., dissenting from the denial of rehearing en banc).

If it were otherwise, discussion and debate would be enfeebled and the First Amendment would be enervated:

12/ The distinction between student activity fees and general university funds may be relevant to this Court's Establishment Clause jurisprudence, which bars direct public support for sectarian religious activities. *See Rosenberger*, 515 U.S. at 841 (1995) ("Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to provide financial support for a church."). *Rosenberger* distinguished the student activity fee from "proceeds of the general [tax] assessments" as part of its Establishment Clause analysis. *Id.* at 851 (O'Connor, J., concurring); *see also id.* at 890 (Souter, J., dissenting) (noting that under the majority's analysis, "the bar against direct aid applies only to aid derived from tax revenue"). When the Establishment Clause is at issue this distinction matters because the constitutional inquiry is whether government is creating the "impression" that it is "endorsing religion." *See id.* at 841. But the distinction is irrelevant here.

> Just as these plaintiffs have a 'hit list' of organizations to which they object, other students will have their own lists. At a large and diverse university like the University of Wisconsin at Madison, some students will almost certainly object just as strongly to a Christian Coalition, or to the Federalist Society, or to the Pro-Life Action League as these plaintiffs do to WISPIRG, the Campus Women's Center, the Lesbian, Gay, Bisexual Campus Center, and the rest.

Id. at 1129. Rather than protecting free speech and the public university's unique role in society as a true "marketplace of ideas," applying *Abood* to the University of Wisconsin would effectively place a "heckler's veto" in the hands of every student who found the views of any other student to be objectionable. *Cf. Reno v. ACLU*, 521 U.S. 844, 847 (1997) (invalidating Communications Decency Act because the Act conferred "broad powers of censorship, in the form of a 'heckler's veto' upon any opponent of indecent speech").

The Court of Appeals implied that the impact on student groups of allowing this type of individual veto can be minimized though reliance on some sort of opt-out mechanism. *See Southworth*, 151 F.3d at 734. An opt-out procedure, however, is not constitutionally required. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). Furthermore, an opt-out scheme neglects both the importance of budgeting to student groups' overall effectiveness and the important message to the student body at large of a university community committed to an open public forum. As the Second Circuit found in *Carroll*, considering the funding of New York Public Interest Research Group ("NYPIRG") by the students at State University of New York Albany:

> Clearly, the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities. Of equal importance is the stability and predictability the fee scheme provides . . . Viewed from the students' perspective, an alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view.

957 F.2d at 1001-02.

Alternatively, of course, the University could eliminate the student fee altogether. But as Judge Wood observed, that would be a "perverse way indeed to safeguard the kind of free and open political and intellectual debate that lies at the heart of the First Amendment, and that is especially important in a university setting." *Southworth*, 157 F.3d at 1129 (D. Wood, J., dissenting). If some students object to the ideas expressed by other students in the University's public forum, the proper remedy cannot be to restrict access to the forum or to eliminate the forum altogether. As Justice Brandeis observed over seventy years ago, the remedy to be applied is not silence but "more speech." *Whitney v. California*, 271 U.S. 357, 377 (1927) (Brandeis, J., concurring).

III. The University of Wisconsin's Allocation of Student Fees Does Not Compel Speech or Association.

Another reason not to apply *Abood* and its progeny here is that the University's allocation of student fees cannot reasonably be equated with compelling an objecting student's speech or association in violation of the First Amendment.

The Court of Appeals offers up the oft-quoted bromide that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Southworth*, 151 F.3d at 730 (quoting *Abood*, 431 U.S. at 234 n.31 (quoting Irving Brant, *James Madison: The Nationalist* 354 (1948))). In fact, "Americans often have money extracted from them and used to promote objects which they ideologically oppose. The most obvious example is the taxpayer." Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L. Rev. 3, 26 (1984). Almost as obvious an example is the student whose tuition money and activity fees may be used to pay the salaries of professors who teach what he does not believe, to fund research whose goals he does not share, or to pay lecturers whose speech he cannot abide.

These exactions do not violate the First Amendment's proscription against compelled affirmation or association. No one could mistake the payment of taxes or tuition — or of the student activity fees at issue here — as a compelled endorsement of views that a taxpayer or student may find objectionable. Unlike the plaintiffs in *Abood* and *Keller*, who were compelled to fund specific messages espousing only the organization's point of view, the objecting students here are not being compelled to fund any particular organization's message. Instead, their student activity fees are used to fund a neutral forum that allows myriad points of view to be debated and discussed. And unlike the plaintiffs in *Abood* and *Keller*, who could not use the organization's funds to subsidize viewpoints in opposition to those paid for by their organizations, the objecting students here have the right to apply to the ASM for funds to promote their own viewpoints in the forum created by the University. As Judge Wood noted in her dissent from the denial of rehearing en banc, the court

below wrongly classified the student activity fee as "a compe'led subsidy of speech itself, rather than a compelled subsidy of a neutral forum for speech." *Southworth*, 157 F.3d at 1128 (D. Wood, J., dissenting).

Judge Wood's characterization of the student activity fees is firmly rooted in this Court's First Amendment jurisprudence. *Rosenberger* is grounded on the very principle that a university may use public funds to support student groups precisely because the use of funds cannot be perceived as an endorsement — whether by the University or of its students — of the ideology or beliefs of a particular recipient of university funds; instead, disbursements from the student activity fee reflect "the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." *Rosenberger*, 515 U.S. at 840. The views expressed by WISPIRG and other groups that respondents find objectionable "will not likely be identified" with respondents and they "are free to publicly dissociate themselves from the views" expressed by WISPIRG and other student groups. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (holding that a state constitution requiring owners of private shopping centers to permit "speech and petitioning" on their premises did not violate their First Amendment rights against compelled speech and association). In these circumstances, respondents have been compelled neither to espouse views they do not hold, nor to associate with groups whose views they do not share.

The absence of compelled speech is also reflected in the breadth and neutrality of the student government's funding of student groups with the student fees. The moneys are used to fund the speech of a multitude of student organizations espousing a wide array of political and ideological views. And the student government allocates available funds to

student groups in a viewpoint-neutral fashion. *See* Pet. for Cert. at 100a - 112a. The structure and purpose of this arrangement is hardly surprising: "It is commonplace to require funding of a neutral forum: the taxpayers of the United States support the Mall in Washington, which is used by speakers with a virtually infinite range of viewpoints." *Southworth*, 157 F.3d at 1128 (D. Wood, J., dissenting).

As this Court held in *Rosenberger*, the collection and disbursement of these student activity fees similarly creates a public forum — perhaps "more in a metaphysical than in a spatial or geographic sense" — but a public forum nonetheless, governed by the same First Amendment principles as other public forums. *Rosenberger*, 515 U.S. at 830. The University of Wisconsin has used the student activity fees it has collected to create a "metaphysical public forum" dedicated specifically to speech activity. In these circumstances, the University may not constitutionally exclude WISPIRG — or any other student group that engages in "speech activity," regardless of whether its speech is "political" or "ideological." *See id.* (citing cases); *cf. FCC v. League of Women Voters*, 468 U.S. 364, 381-82 (1984) (holding that Congress may not require a public television station to refrain from engaging in "editorializing" as a condition for receiving public funds). To exclude groups that most actively promote speech and debate is to eviscerate all meaning from the University of Wisconsin's statutory mission.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

DANIEL H. SQUIRE
Counsel of Record
STUART F. DELERY
CRAIG GOLDBLATT
FRANCISCO MEDINA
MICHAEL D. LEFFEL*
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for Amici Curiae

*Admitted only in Wisconsin

June 14, 1999

APPENDIX

LIST OF AMICI CURIAE

The following student groups in the University of Wisconsin System share a common interest in upholding the student fees in question:

UNIVERSITY OF WISCONSIN- MADISON
- American Civil Liberties Union, UW Madison Chapter
- Adventure Learning Programs
- AHANA
- Alliance for Chemical Free Lawns
- Alliance for Democracy, UW Madison Chapter
- Amnesty International, UW Madison Chapter
- Art History Graduate Forum
- Associated Students of Madison
- Association of Information Systems Professionals
- Association for Asian American Graduate Students
- Brothers Staying Strong
- BS Community
- Buddhism Study Group
- Calvary Lutheran Student Association
- Campaign to End the Death Penalty, UW Madison Chapter
- Campus Women's Center
- Canvas
- Caribbean Association of Madison, UW Madison Chapter
- ChicanArte
- Christmas 4 Kids
- Civil Rights Defense Coalition
- Coalition for Choice, UW Madison Chapter
- Community Action on Latin America
- Comparative Literature Student Organization
- Cycling Club
- Debate
- Discourse Magazine

East Timor Action Network, UW Madison Chapter
El Movimiento Estudiantil Chicano de Aztlan
Environmental Studies Student Association
Federation of Labor at Madison
Free Burma, UW Madison Chapter
Friends of the Rape Crisis Center
Golden Key National Honor Society, UW Madison Chapter
Greater University Tutoring Service
Health Professions Society
Hillel, UW Madison Chapter
Hong Kong Catholic Student Group
Hong Kong Mug Publishers
Humorology
Indian Students Association
Information Retrieval Society
International Socialists Organization, UW Madison Chapter
Jail Library Student Group
Kendo Club University Wisconsin
Kinesiology Club University Wisconsin
Knights of Columbus, UW Madison Chapter
Knitting and Craft Guild
La Colectiva Cultural de Aztlan
LaFollette Institute Student Association
Latino Law Student Association
Lesbian, Gay, Bisexual and Transgender Campus Center
Lesbian, Gay, Bisexual Law Student Union
Lorax Society
Madison Area Jugglers
Madison Coalition for Animal Rights
Madison Film Forum
Madison Filmmakers Collective
Madison Israel Public Affairs Committee
Madison Student Radio

Madison Treaty Rights Support Group, UW Madison Chapter of Midwest Treaty Network
Medical Students For Choice, UW Madison Chapter
Men's Club Volleyball
Mexican Student Association
Mifflin St. Co-op Student Organization, UW Madison Chapter
Mining Impact Coalition, UW Madison Chapter
Model Organization of American States, UW Madison Chapter
Model United Nations, UW Madison Chapter
National Association for the Advancement of Pangeon Peoples, UW Madison Chapter
National Lawyers Guild, UW Madison Chapter
Omulu Capoeira
Order of Sleepless Knights
Panhellenic Association, UW Madison Chapter
Physicians for a National Health Program, UW Madison Chapter
PreLaw Society
Progressive Organization Alliance
Progressive Student Network, UW Madison Chapter
Public Interest Law Foundation
Q-Grads, UW Madison Lesbian, Gay, Bisexual and Transgender Graduate Students
Queer Student Alliance
Rainbow Activists for a Democratic Society
Returning Adult Student Association
Ripple of Active Resistance, UW Madison Chapter
Rural Sociology Outreach Undergraduate Project
Sex Out Loud
Sigma Alpha Iota
Soccer Club
Society of Women Engineers, UW Madison Chapter

St. Francis International Interfaith Cooperative
Student Labor Action Coalition
Student Pugwash, UW Madison Chapter
Students for a Free Tibet, UW Madison Chapter
Students for Macro Social Work
Students for the New Party, UW Madison Chapter
Students Uniting Business and Engineering
Take Back the Night Coalition
Tenant Resource Center
Ten Percent Society
Triathlon Club
Undergraduate Zoological Society, UW Madison Chapter
University of Wisconsin Greens
Violence Prevention Advocates
Wildlife Society, UW Madison Chapter
Wisconsin Black Student Union
Wisconsin Student Public Interest Research Group
Wisconsin Students Unite
Wisconsin Union Directorate, Alternative Breaks Committee
Wisconsin Union Directorate, Art Committee
Wisconsin Union Directorate, Contemporary Issues Committee
Wisconsin Union Directorate, Distinguished Lecture Series
Wisconsin Union Directorate, Memorial Union Music and Entertainment Committee
Women's Arts and Technology Collective
Women's Water Polo
Wunk Sheek American Indian Student Association
Young Feminist Task Force, UW Madison Chapter

UNIVERSITY OF WISCONSIN- MILWAUKEE
Burma Refugee Relief Coalition
Free Burma, UW Milwaukee Chapter
Student Environmental Action Coalition
Students of India

UNIVERSITY OF WISCONSIN- STEVENS POINT
Progressive Action Organization

UNIVERSITY OF WISCONSIN- LACROSSE
Office of Multicultural Student Services

Supreme Court, U.S.
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No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, AND HADASSAH IN SUPPORT OF NEITHER PARTY

STEVEN K. GREEN*
AYESHA N. KHAN
Americans United
for Separation of
Church and State
1816 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 466-3234

ELIZABETH J. COLEMAN
STEVEN M. FREEMAN
Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 885-7743

TANA SENN
Hadassah
50 West 58th Street
New York, NY 10019-2500
(212) 355-7900

* *Counsel of Record*

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INTERESTS OF *AMICI CURIAE*[*]

Americans United for Separation of Church and State

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 1995). Americans United is composed of approximately 60,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths, with some holding no religious affiliation. Members are united in their commitment to maintaining the separation of church and state, and believe that the funding of religious activity runs afoul of this principle.

Anti-Defamation League of B'nai B'rith

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and

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[*]Letters of consent to the filing of this brief have been filed with the Clerk of Court by counsel of record for the parties in this case in accordance with U.S. Sup. Ct. R. 37. Pursuant to U.S. Sup. Ct. R. 37.6, *amici* disclose that no counsel for any party in this case authored in whole or in part this brief, and that no person or entity other than *amici curiae* made a monetary contribution to the preparation of this brief.

religious prejudice in the United States. ADL adheres to the principle that the above goals and the general stability of democracy are best served through the separation of church and state and the protection of the right to free exercise of religion. In support of this principle, ADL has previously filed *amicus curiae* briefs in numerous cases including Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Board of Education of Kiryas Joel School District v. Grumet, 512 U.S. 687 (1994); Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986); and Lemon v. Kurtzman, 403 U.S. 602 (1971).

Hadassah, The Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., is the largest women's organization and the largest Jewish membership organization in the United States, with over 300,000 members nationwide. Hadassah also has a proud history of protecting the rights of the Jewish community in the United States. Founded in 1912, Hadassah has long been committed to strict separation of church and state pursuant to the belief that it serves to guarantee religious freedom and diversity. Hadassah has participated in numerous *amicus curiae* briefs in support of this vital principle.

SUMMARY OF ARGUMENT

In Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995), the Court upheld the use of a university student activity fee for a publication asserting a religious viewpoint. The Court will be asked in this case to evaluate the impact of this holding on the issues presented here. In doing so, *amici* urge the Court to be cognizant that the principles enunciated in Rosenberger -- neutrality, even-handedness, diversity of viewpoints, and general availability of a benefit -- are particularly suited to evaluating the constitutionality of funding programs that are created and designed to facilitate expressive activity, commonly known as "public fora." These principles are less determinative, however, of the constitutionality of funding schemes that do not constitute such fora. In the latter case, the Court's Establishment Clause decisions demonstrate that, even in the context of a neutral program, other principles of equal jurisprudential pedigree serve to limit the availability of funding for religious activities and institutions. Thus, in the event that the Court finds that the neutrality of the program at issue in this case obviates the need for an opt-out to be made available to the plaintiffs, the Court's Establishment Clause jurisprudence dictates that this holding should be limited to the context of public fora for speech activities.

ARGUMENT

Introduction

This case presents the question whether "the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech."

Petitioners argue that the student activity fee does not constitute "compelled speech" because it funds a viewpoint neutral forum rather than any particular point of view. This argument relies on Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995),[1] in which this Court upheld the use of a university student activity fee for a publication asserting a religious viewpoint in a limited public forum for speech activities. See Pet. for Cert. at 14. Although the case at bar does not raise an Establishment Clause question,[2] the Court's treatment of Rosenberger may have a substantial impact on Establishment Clause issues that are presented to this Court and the state and lower federal courts in the future -- such as the public funding of private school vouchers and faith-based delivery of social services, which are currently being defended with arguments much like those made by Petitioners here. See Jackson v. Benson, 578 N.W.2d 602 (Wis.), cert. denied, 119 S. Ct. 466 (1998). Accordingly, while *amici* do not take a position

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[1]*Amici* filed a friend of the court brief in Rosenberger on behalf of the University of Virginia.

[2]Although Respondents' objections to certain groups rest in part on their religious convictions, none of the student organizations in question engages in religious speech or activity. See Resps.' Opp. to Pet. for Cert. at 4-10 (listing organizations plaintiffs find objectionable and describing objections). This may be due in part to the fact that University of Wisconsin regulations prohibit the use of student activity fees for "[a]ctivities which are politically partisan or religious in nature." See Guidelines for Expenditures from Student Segregated University Fees and Campus Activity Receipts § III.B.6. However, we may assume that student speech with a religious perspective is funded, or will be funded in the future, in accordance with the holding of Rosenberger, 515 U.S. at 837.

on the precise issue presented in this case, we submit this brief because of the important Establishment Clause implications of this issue, and to urge the Court to cabin its decision in a manner that is consistent with the Court's Establishment Clause jurisprudence.

"Neutrality" is Pivotal to the Constitutionality of Government Funding of Free Speech Fora, But Is Only One of Many Factors to Be Considered in Assessing the Constitutionality of Other Kinds of Government Funding Programs.

In Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 837-46 (1995), the Court held that a religious student newspaper could participate in a general university program for funding student enterprises and publications without violating the Establishment Clause. Litigants around the country have argued that it follows from Rosenberger that "neutral" funding programs, such as a school voucher scheme that applies to secular and parochial private schools, pass constitutional muster. See, e.g., Strout v. Albanese, No. 98-1986, 1999 W.L. 329272 (1st Cir. May 27, 1999); Jackson, 578 N.W.2d at 616. While the constitutional propriety of such funding schemes is not presented in this case, *amici* urge the Court, in writing the Opinion in this case, to be cognizant of the distinction between the role of neutrality in the free speech/public fora context -- such as that presented here -- and the role of neutrality in other contexts not before the Court.

Issues of access to government space and funding have received considerable attention from the Court in the past several years. See National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998); Rosenberger, 515 U.S. 819 (1995); Capitol Square Review and Advisory Bd. v. Pinnett, 515 U.S.

753 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985); Widmar v. Vincent, 454 U.S. 263 (1981). In each of these cases, the Court asked whether the program or service at issue was created and designed to facilitate expressive activity. See, e.g., Rosenberger, 515 U.S. at 834; Cornelius, 473 U.S. at 802-03. The Court has been inclined to uphold or authorize access when the government, "following neutral criteria and evenhanded policies," has extended access or benefits to recipients "whose ideologies and viewpoints, including religious ones, are broad and diverse." Rosenberger, 515 U.S. at 839. This is because the principles that animate the Free Speech Clause require that government remain viewpoint neutral and refrain from regulating speech on the basis of disagreement with its content. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).[3]

The requirement of viewpoint neutrality served as the

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[3]Programs that fund government functions or messages -- even where the government employs private individuals to further its goals -- do not constitute public fora and thus need not necessarily comply with the neutrality principle. See Rust v. Sullivan, 500 U.S. 173, 193-196 (1991). However, while the free speech restrictions are diminished in the context of government speech because government has wide discretion in formulating the content of its own speech and policies, the Establishment Clause limitations are enhanced because the activity carries with it the government's imprimatur. See Finley, 118 S. Ct. at 2178; Lamb's Chapel, 508 U.S. at 390-91; Rust, 500 U.S. at 193.

basis for the Court's Free Speech *and* Establishment Clause holdings in Rosenberger. See 515 U.S. at 828-37 (free speech ruling rests on prohibition on viewpoint discrimination); id. at 837-46 (Establishment Clause ruling results from fact that the object of the student activity fee "is to open a forum for speech and to support various student enterprises . . . in recognition of the diversity and creativity of student life"). Thus, viewed correctly, Rosenberger is at its heart a free speech case. See Finley, 118 S. Ct. at 2178.[4]

These criteria -- general availability, neutrality, evenhandedness, and diversity of viewpoints -- are appropriately suited for addressing issues of access to fora created for expressive activity, even where funding may be involved. And, indeed, a university setting, with its tradition of academic freedom and commitment to creative thinking and open inquiry, is the paradigmatic context for such a forum:

> [I]n the University setting, . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began

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[4] See Kathleen M. Sullivan, Parades, Public Squares and Voucher Payments: Problems of Government Neutrality, 28 Conn. L. Rev. 243, 255 (1996) ("*Rosenberger* concerned the equivalent of a public square. . . . The University of Virginia subsidy program had merely provided a platform for private speech, largely unregulated as to subject matter except for the exclusion of religion").

> as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

Rosenberger, 515 U.S. at 835-36; see also id. at 840 (noting that "wide-ranging speech and inquiry" is "an integral part of the University's educational mission"); accord Finley, 118 S. Ct. at 2178.

However, in the context of funding schemes that do not involve free speech fora, the Court has placed significantly less emphasis on neutrality, recognizing other principles of "equal historical and jurisprudential pedigree." Rosenberger, 515 U.S. at 849 (O'Connor, J., concurring). This is because there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions . . . even under a neutral program that includes nonsectarian recipients." Id. at 842. Thus, Rosenberger "neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." Id. at 852 (O'Connor, J., concurring).

Accordingly, while religious speech must be treated like its non-religious counterparts in the context of public fora for

expression,[5] this principle does not hold true in the context of funding schemes that are not designed for expressive activities. Otherwise, government would be required to provide grants for spiritual counseling merely because it funds secular counseling services, to pay for the construction of college chapels merely because it pays for science buildings, to allow public school teachers to pray with their students merely because they engage them in discussions on secular subjects, and to subsidize sectarian schools to the same extent as the public schools. Yet, each of these practices has been disapproved by the Court. See Bowen v. Kendrick, 487 U.S. 589 (1988) (holding that using counseling grants for religious purposes would be unconstitutional); Tilton v. Richardson, 403 U.S. 672 (1971) (prohibiting use of federal construction grants for religious buildings); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963) (prohibiting school sponsored prayer and Bible reading); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 787 (1973) (rejecting equalization argument as inviting the "massive, direct subsidization of sectarian elementary and secondary schools").

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[5]Even in the free speech context, the Court has recognized that neutrality is not the only factor in an Establishment Clause inquiry. In Rosenberger, several other factors guided the Court's decision: that the funds came from student fees, not tax dollars, see 515 U.S. at 840-41; that the funds were disbursed directly to a vendor to pay for speech activity, and did not flow to the "coffers" of a religious group, see id. at 842-43; id. at 850 (O'Connor, J., concurring); that the fee was used for a secular activity (in that case, printing), see id. at 840-41; and that payments to religious organizations "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity" were prohibited, see id. at 840.

The holding in Tilton highlights the insufficiency of neutrality as a controlling principle in Establishment Clause cases. In Tilton, the Court upheld the constitutionality of the Higher Education Facilities Act, which provides funds for the construction of college and university facilities. Private and church-related colleges were eligible to receive federal funds under this neutral and generally available program, but the program prohibited the use of funded facilities for sectarian instruction or as a place of worship. Notwithstanding this prohibition and the neutrality of the program, the Court interpreted the law to exclude participation by pervasively sectarian colleges -- the equivalent of parochial schools -- and struck down a provision of the law that allowed funded facilities to revert to religious use after twenty years. See 403 U.S. at 683; see also Hunt v. McNair, 413 U.S. 734, 743-44 (1973) (upholding use of revenue bonds to finance construction of college facilities, where recipient institution was not pervasively sectarian and constructed facilities could not be used for sectarian instruction or religious worship).

This principle was reaffirmed in Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976), in which the Court upheld a government grant program with the same caveat: the funds could not be given to pervasively sectarian colleges and could not be used for religious purposes. Emphasizing the limits to the neutrality principle in the funding context, the Court stated:

> The Court has taken the view that a secular purpose and facial neutrality may not be enough, if in fact the State is lending direct support for religious activity. The State may not, for example, pay for what is actually religious education, even though it purports to be paying for a secular one, *and even though it makes its aid available to secular and religious institutions alike.*

Id. at 747 (emphasis added). Each of these cases involved a general aid program that provided benefits to a broad array of secular and religious institutions on an evenhanded basis, but in none of them was that fact dispositive.

The Supreme Court's more recent cases have reaffirmed the principle that evenhandedness alone does not ensure the constitutionality of a funding program. In Bowen v. Kendrick, 487 U.S. 589 (1988), the Court upheld a facial challenge to the Adolescent Family Life Act (AFLA), a federal grant program that provides funds on a neutral basis to a "wide spectrum" of secular and religiously affiliated institutions engaged in pregnancy counseling and family planning services. Id. at 602, 608. Even though the Court upheld the program's facial constitutionality, it noted that there was "no intimation in the statute that at some point, or for some grantees, religious uses are permitted." Id. at 614. But even more to the point, the Court remanded the case to the district court to consider "whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'" Id. at 621 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). Thus, notwithstanding the breadth and neutrality of the program, the Court held that religious uses of federal funds would still be unconstitutional. Justice O'Connor underscored this point in her concurrence, stating that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." Id. at 623 (O'Connor, J., concurring) (emphasis in original).

The holdings in Mueller v. Allen, 463 U.S. 388 (1983), Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1987), or Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), do not represent departures from these principles. To be sure, program neutrality was critical to the analysis in each of these cases; however, it was only one of several factors the Court considered. Witters and Zobrest involved disability entitlement programs under which the plaintiffs had preexisting interests; thus, those holdings were little more than extensions of the unremarkable proposition that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier." Witters, 474 U.S. at 486-87. Even under those facts, the Witters Court cautioned that a state could not "grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school." Id. at 487. Mueller involved a tax deduction involving benefits that were so removed from the sectarian schools that they could only be characterized as "attenuated." Mueller, 463 U.S. at 399. Although the Court deemed neutrality important, the case turned as much on the absence of any significant financial benefit flowing to the parochial schools. See id. at 400.

The significance of considerations other than neutrality to an Establishment Clause inquiry that does not invlove a forum for speech is most clearly seen in Zobrest. After noting the neutrality of the program at issue, the Court went on to emphasize the lack of *any* financial benefit to the religious school, 509 U.S. at 10 ("no funds traceable to the government ever find their way into sectarian schools' coffers"), and to observe that the program "did not relieve sectarian schools of costs they otherwise would have borne in educating their students." Id. at 12. And in its most recent Establishment

Clause decision, Agostini v. Felton, 117 S. Ct. 1997 (1997), the Court reaffirmed the importance of factors other than neutrality, highlighting that the aid at issue in the case did not involve the flow of funds to parochial schools and supplemented rather than supplanted the schools' curricula. See id. at 2013.

In sum, the emphasis placed by the Court on the neutrality of funding programs varies considerably, depending on the nature of the program. When evaluating free speech fora, the Court has deemed neutrality to be of central importance; in other contexts, the Court has deemed other principles to have equal jurisprudential pedigree. Thus, in the event that the Court finds that the neutrality of the University of Wisconsin's program justifies the imposition of a student activity fee without offering an opt-out to objectors because of the nature of the forum created by the fees, we respectfully submit that the Court should limit this justification to the specific context before it, namely, the funding of fora for speech activities. In so doing, the Court would render a ruling that is consistent with its prior holdings under both the Free Speech and Establishment Clauses.

CONCLUSION

Amici urge the Court to fashion a decision that is in accord with its free speech *and* Establishment Clause jurisprudence.

Respectfully Submitted,

STEVEN K. GREEN*
AYESHA N. KHAN
Americans United for
Separation of Church and
State
1816 Jefferson Place, NW
Washington, D.C. 20036
(202) 466-3234

ELIZABETH J. COLEMAN
STEVEN M. FREEMAN
Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 885-7743

TANA SENN
Hadassah
50 West 58th Street
New York, NY 10019-2500
(212) 355-7900

* *Counsel of Record*

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IN THE
Supreme Court of the United States

BOARD OF REGENTS OF
THE UNIVERSITY OF WISCONSIN,
Petitioner,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* UNITED STATES STUDENT ASSOCIATION, *et al.*, URGING REVERSAL

DAVID C. VLADECK
(*Counsel of Record*)
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, NW
WASHINGTON, DC 20009
(202) 588-1000

Attorneys for *Amici Curiae*
United States Student Association, *et al.*

June 14, 1999

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This brief is submitted by the United States Student Association ("USSA"), the Associated Students of Madison, and fifteen of USSA's other state and campus affiliates, in support of the petitioner Board of Regents of the University of Wisconsin. *Amici* seek reversal of the ruling of the Seventh Circuit, affirming in large part the district court's order forbidding the University from using student activity fees to support student organizations that take positions on political or ideological issues.[1]

INTEREST OF *AMICI*

USSA is the nation's oldest and largest student organization, representing the student governments of over 300 colleges and universities -- both public and private -- throughout the nation. USSA advocates on behalf of students on issues relating to higher education, focusing principally on defending students' privacy and free speech rights, increasing access to higher education through enhanced financial aid, and ensuring that universities implement fair and open admissions policies. USSA is the recognized student voice in Congress, the White House, and the Department of Education. Associated Students of Madison, a member of USSA, is the student government of the University of Wisconsin at Madison; it is responsible for allocating student activity fees to recognized student organizations, and made the allocations of funds challenged in this proceeding. This brief is also submitted on behalf of the

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that no one other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

following affiliated state and campus organizations -- Oregon Student Association, Washington Student Lobby, Minnesota State University Student Association, North Dakota State University Student Association, Oklahoma Student Government Association, Kentucky Board of Student Presidents, Student Association of State Universities of New York, University of California Student Association (representing the student government at all 12 University of California campuses), California State Student Association (representing all 23 campuses in the California State University System), Alaska Coalition of Student Leaders, Colorado Student Association, University of Colorado-Boulder Student Union, Florida Student Association, University of Kansas Student Senate, and Ulster County Community College Student Government.

Amici are organizations that represent the student governments responsible for allocating student fees to qualifying organizations. They have a direct stake in the outcome of this proceeding because they believe that robust and active student debate is the *sine qua non* of a quality university. Because the ruling below threatens the ability of state universities to sponsor student forums for debate, *amici* urge this Court to reverse the judgment below.[2]

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[2] As democratically-elected student governments, *amici* serve as representatives of the students on the campuses they serve. In this respect, they are different from the student organizations whose activities are at issue here. As discussed below, those organizations represent only those students who choose to associate with them.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case was brought to enjoin the Board of Regents of the University of Wisconsin (the "University") from allocating any portion of the mandatory student activity fee to support student organizations that take positions on ideological or political issues. The Seventh Circuit held that, by imposing a mandatory fee that is used, even in part, to support organizations that take positions on political or ideological matters with which the objecting students disagreed, the University violated the students' First Amendment rights.

This Court should reverse. The Seventh Circuit's ruling is not compelled by, but is in fact inimical to, the First Amendment. The core purpose of the First Amendment is to protect and nurture free expression, not to stifle it. Nothing in the First Amendment forbids state universities from creating a forum for student groups to engage in robust and spirited debate on any subject -- especially political or ideological issues -- so long as the university does not discriminate on the basis of viewpoint. Accepting the Seventh Circuit's view of the First Amendment would transform state university campuses into sterile ivory towers, with student groups, newspapers, speakers bureaus, and debating societies subject to strict censorship rules to ensure that they steer clear of any issue having political or ideological overtones.

This brief will not address each of the flaws in the Seventh Circuit's opinion. Instead, it highlights three key points that might not stand out in the University's more comprehensive treatment of the issues.

1. The First Amendment issue in this case arises because the University uses separately assessed mandatory student fees

to fund a limited public forum dedicated to expressive activity by University students. Had the University used general revenues -- whether from tuition, state aid, or other sources (such as proceeds from football ticket sales) -- there would be no question that the University would have created a limited public forum and that the compelled speech doctrine would not be applicable. In that case, this Court's precedents make clear that the University would *violate* the First Amendment by excluding student groups because they take positions on political or ideological issues. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972). The fact that the fees at issue here come from student activity fees, rather than tuition payments or other funds, cannot justify the Seventh Circuit's failure to apply public forum principles. In either case, money is being exacted from students to support a forum for student debate, and hence public forum principles govern. *Rosenberger*, 515 U.S. at 833-35.

2. Relying on this Court's compelled speech cases, the Seventh Circuit held that the First Amendment forbids a state university from assessing students fees earmarked for the purpose of creating a forum for student discourse, insofar as that discourse includes political and ideological issues. The compelled speech cases are not controlling, however, because here the fee has not been exacted to support the University's own speech, or that of an identified speaker, but rather to create a forum open to all student speakers on a non-discriminatory basis.

To be sure, the general principles developed in cases like *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), have been applied in student fee cases. But with the exception of the

Seventh Circuit, the courts have modified the analysis considerably because the use of mandatory student fees in an academic setting is very different than the use of compulsory bar or union dues. Unlike the union or bar membership cases, where association is unquestionably compelled, University students are not coerced into affiliating with any student organization, and no student organization purports to speak on behalf of all students. Students are free to associate with any organization they choose, or with no organization at all. Thus, unlike compulsory union or bar membership, mandatory student fees do not implicate core associational rights. Recognizing this crucial difference, other courts almost unanimously have held that academic judgments by a university about the germaneness of the activities carried out by student groups to a university's educational mission are presumptively valid and may be set aside in only the rarest instance. This principle was ignored by the court below.

3. Making matters worse, the Seventh Circuit's ruling overlooks altogether the First Amendment rights of the students who support these organizations and who have worked to have them qualify to participate in the University's forum. To be sure, the First Amendment protects the minority from tyrannical oppression by the majority. But the First Amendment also protects the majority as well as the lone dissenter from a heckler's veto. In this case, respondents seek to exclude a handful of student organizations from a university-supported public forum for only one reason -- because respondents disagree with the organizations' messages. That goal, however, is completely incompatible with the First Amendment. The objecting students have every right to avail themselves of the forum. The First Amendment solves their dilemma not by enforcing silence, but by encouraging greater speech and debate. Because the Seventh Circuit's opinion subverts that value, its

judgment should be reversed.

ARGUMENT

THE FIRST AMENDMENT DOES NOT FORBID THE USE OF MANDATORY STUDENT FEES TO CREATE A FORUM FOR STUDENT GROUPS TO ENGAGE IN EXPRESSIVE ACTIVITIES, INCLUDING POLITICAL AND IDEOLOGICAL ACTIVITIES.

I. Public Forum Analysis Compels Reversal.

Although respondents have cast their claim as one to vindicate core First Amendment values, their claim is misguided. Respondents do not claim that the fee system results in any direct restriction on their own rights of speech, expression, or association. Respondents continue to be entitled to speak out on any issue of concern to them, without interference from the University or any of the student organizations that offend them. Nor are respondents compelled to associate or affiliate in any way with any student organization with which they do not agree, and no reasonable person would associate respondents with any such organization.

Because the University exacts fees not to pay for its own speech, but in part to create a forum for expressive activities by all of its students, the controlling legal principles are those that govern limited public forums. *Rosenberger*, 515 U.S. at 834. This Court has long recognized that universities foster a "marketplace of ideas" by providing "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citation omitted). It is "the business of a university to provide that atmosphere which is most conducive

to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). The University of Wisconsin provides that atmosphere by, among other things, allocating a portion of its student activity fees to the student government (*amicus* Associated Students of Madison) which, in turn, distributes some of the monies collected to qualifying student organizations. Through this process, the University has created a limited public forum that encourages "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834; *see also Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1039 (9th Cir. 1999), *pet. for rehearing and rehearing en banc stayed* (9th Cir., May 4, 1999). *Rosenberger* makes clear that, once a university establishes a forum for students, traditional public forum principles constrain the university's administration of that forum. 515 U.S. at 834-36; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).[3]

Applying a public forum analysis, it is clear that the Seventh Circuit's conclusion -- that the University is compelled to exclude organizations that take political or ideological positions -- is 180-degrees backwards. A long line of this Court's cases, including *Rosenberger*, *Lambs Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), *Widmar*, and *Healy*, which go unmentioned by the Seventh

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[3] The University has limited access to its forum to recognized student groups that meet a number of neutral criteria. To qualify, an organization must, among other things, be non-profit, be controlled and directed by students, be composed mainly of students, and be engaged in activities that have a relation to campus affairs. Allocated fees may not be used to support partisan political activities.

Circuit, establishes that, once the university creates a limited public forum, it must grant students equal access to that forum and may not engage in viewpoint-based discrimination against speakers. Thus, this Court's public forum jurisprudence *forbids* universities from doing precisely what the court ordered in this case, namely, *excluding* speakers from a public forum because they seek to address political or ideological issues. Indeed, until the Seventh Circuit ruling in *Southworth*, the lower courts had almost unanimously upheld the use of mandatory student fees to support a forum for student discourse over the objections of students who disapproved of the ideological position of a funded group. These courts reasoned that the governmental interest in fostering spirited debate on college campuses outweighed any First Amendment claims by the objecting students not to have what amounts to, at most, a few of their dollars spent for those purposes.[4]

[4] *Rounds*, 166 F.3d at 1039; *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973); *Larson v. Board of Regents of Univ. of Nebraska*, 204 N.W.2d 568 (Neb. 1973); *Veed v. Schwartzkopf*, 478 F.2d 1407 (8th Cir. 1973)(*affirming mem.* 353 F. Supp. 149 (D. Neb. 1973)), *cert. denied*, 414 U.S. 1135 (1974); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974) (campus newspaper); *Good v. Associated Students of Univ. of Washington*, 86 Wa.2d 94, 542 P.2d 762 (1975); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983) (campus newspaper); *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) ("*Carroll I*"), *on motion to enforce judgment*, 42 F.3d 122 (2d Cir. 1994)("*Carroll II*"); *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992) (campus newspaper); *Gay and Lesbian Student Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988); *cf. Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982) ("*Galda I*"), (continued...)

Contrary to virtually all of the prior decisions on this issue, the court below apparently thought public forum principles were inapposite because the money used to create and maintain the University's forum comes from student activity fees, rather than from tuition payments or some other source. But that fact cannot possibly bear the weight placed on it by the Seventh Circuit. It is implausible to contend that the constitutional inquiry would be different in this case had the University simply added the $165 student activity fee to the existing tuition bill. In both cases, the objecting students' argument is the same -- namely, that they are being compelled to support, albeit indirectly, organizations with which they disagree. The question is not, as the Seventh Circuit seemed to believe, how or in what form the funds are paid by the students, but whether the exaction itself violates the First Amendment. As we now show, the compelled speech cases relied on by the

[4](...continued)
subsequent opinion sub nom. Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986)("*Galda II*"); *Tipton v. University of Hawaii*, 15 F.3d 922 (9th Cir. 1994). Prior to the Seventh Circuit's ruling here, only the California Supreme Court took a different view. In *Smith v. Regents of University of California*, 844 P.2d 500, *cert. denied*, 510 U.S. 863 (1993), the Court mistakenly regarded the group receiving the portion of the student fee, instead of the fee system itself, as constituting the relevant forum. 844 P.2d at 509 n.8. *Smith* has been severely criticized. Carolyn Wiggins, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees To Support Political Speech at Public Universities*, 103 Yale L.J. 2009 (1994). In light of this Court's holding in *Rosenberger*, *Smith* is no longer of precedential value.

Seventh Circuit undercut, not support, its ruling.[5]

II. The Compelled Speech Cases Do Not Justify The Seventh Circuit's Ruling.

In ruling that a state university violates the First Amendment by requiring students to pay a fee that goes to support organizations that take positions that offend some students, the Seventh Circuit relied on four First Amendment cases -- *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); and *Keller v. State Bar of California*, 496 U.S. 1 (1990) -- and applied them uncritically to a situation for which they were never intended. *Abood*, *Ellis* and *Lehnert* all involved challenges by individuals to the payment of union dues compelled by virtue of "union shop" requirements, where the individuals disagreed with some or all of the union's positions. *Keller* raised similar issues in the context of mandatory bar membership. *Abood* and its progeny do not stand for the proposition that no political speech may be funded by mandatory dues. Only political speech substantially *unrelated* to the entity's core purpose -- that is, the purpose that justifies the mandatory

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[5] Without any explanation, the Seventh Circuit exempted student newspapers and lecture series from its ruling. 151 F.3d at 721, 727 n.8. Apparently, the court recognized that a contrary ruling would end editorial pages in student newspapers, and place off limits most controversial topics for speakers and debating societies. As a matter of logic, there is no principle that limits the reach of the Seventh Circuit's rationale in that manner, since the offensive nature of the "compulsion" is identical in each case.

nature of the dues payment -- may not be funded in that manner.

Abood and the cases that have followed it establish a two-step inquiry where claims of compelled speech are raised in the context of mandatory fees. The first determination focuses on whether the use of the compulsory fee violates the First Amendment rights of the objector. *See Ellis*, 466 U.S. at 449-50. Once an infringement is identified, the second and often more crucial question is whether the compulsion is justified because the speech is germane to the institution's purpose. In the labor context, for example, the answer to this question depends on the balance between the state's interest in furthering the collective bargaining process and the extent to which the funded activity burdens First Amendment rights.

For a host of reasons, until the Seventh Circuit's ruling below, the *Abood* line of authority has not been applied uncritically in cases dealing with mandatory student fees. *See* n.4 *supra*. Indeed, the decision below parts company with virtually every prior decision, where the courts have applied a highly deferential standard of review to the educational judgments that lie at the core of cases like this. *Rounds*, 166 F.3d at 1038-39; *Carroll I*, 957 F.2d at 999; *Carroll II*, 42 F.3d at 128; *Galda I*, 686 F.2d at 166.

This Court has never addressed how courts should evaluate charges of compelled speech where the "compulsion" is to support a university-sponsored forum for students. Lower courts, however, have rightly recognized that treating a diverse and contentious campus exactly as if it were a labor union makes little sense. There are at least three reasons why the intense judicial scrutiny called for by *Abood* has not, and should not, be applied in a university setting.

First, although there is plainly an intrusion on First Amendment rights in the *Abood* cases, there is no such infringement here. Labor unions are authorized to speak for, and to make legally binding decisions on behalf of, all employees regardless of whether they are union members or ardently anti-union. Labor unions also lobby and take public positions on behalf of all employees; they are, in every sense, the employees' "spokesperson." Union dissenters suffer First Amendment injury not simply because they are compelled to affiliate with an organization that takes positions on their behalf to which they do not subscribe, but also because there are no institutional channels available to dissenting employees to voice their views publicly. Thus, those cases involve compelled political association and speech, not simply compelled financial support for a highly diverse forum.[6]

There is no compelled association at issue here. None of the objecting students is compelled in any way to join or be counted as a member of any organization of which they disapprove. Unlike some of the other student fee cases, the payment of a student fee does not automatically confer membership status in any of the student groups at issue here.[7]

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[6] The Ninth Circuit's recent ruling in *Rounds* drives this point home, and concludes that, because there is no compelled speech or association in the student fee context, there is no need to apply strict scrutiny in student fee cases. 166 F.3d at 1037-38 & n.4.

[7] This contrasts sharply with both *Carroll*, where the payment of student fees automatically made students New York Public Interest Research Group members, *Carroll I*, 957 F.2d at (continued...)

None of the respondents here believes that he or she is a member of any of the allegedly offending organizations, or that any of the organizations is authorized to speak or to take action on his or her behalf. The University forces no student to participate in any organization. Nor do any of these organizations purport to speak generally for students at the University on any matter. Rather, student activity fees support over 100 organizations, each of which contributes distinct viewpoints to the university forum. Thus, unlike the union dissenters who have no institutional outlet to express their views, student dissenters may voice their views freely in the university's forum and may band together with like-minded students to form organizations that advocate their positions in the University's marketplace of ideas.

Even if the Court were to conclude that the mandatory student activity fee implicates First Amendment rights, the only right arguably infringed is the right not to be compelled to contribute to the student government, which in turn allocates a few dollars each semester to a handful of organizations whose messages offend respondents. Given the broad diversity of student groups supported by student activity fees, virtually every student could "object" to what some organization is doing or saying. Surely, the International Socialist Organization likely opposes whatever the Federalist Society supports and *vice versa*. Yet if the Seventh Circuit is correct, neither group could continue to receive student activity fees, no matter how valuable

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[7](...continued)
1003, and *Galda*, where there was a special mandatory fee for a single organization, and a student had to ask for a refund in order to disaffiliate with the organization. *Galda I*, 686 F.2d at 166.

its contribution to the University's educational mission. Even assuming that a compelled contribution to support this kind of student activity could violate the First Amendment -- a proposition with which we disagree -- any intrusion is slight, mainly because the connection between each student's fee and the speech by one of 100 organizations is so remote and the degree of "compulsion" is so minimal.

Second, the relationship between a union and objecting workers is markedly different than the relationship between a university and its students. The principal reason for rigorous review in the *Abood* context is the inherent antagonism between the union exacting the fees and the objectors. A labor union has every incentive to define activities as germane to the collective bargaining process, both because of its self-interest in maximizing its revenues and because it is unconcerned about safeguarding the rights of dissidents. Even in this charged context, however, the Court has warned that the term "germane" cannot be given a cramped reading because a union must have "a certain flexibility in its use of compelled funds." *Ellis*, 466 U.S. at 456. But universities exact student fees not to amplify their own speech or to reward a preferred speaker, but to provide an open and diverse forum for student expression. Thus, the adversity present in the union context is altogether absent in the university setting. Here, the institution -- the University of Wisconsin -- is neither itself a speaker nor is it in an antagonistic position toward respondents; it is, and by law must be, strictly neutral, and respondents have not challenged the University's impartiality here. *See, e.g.*, *Rosenberger*, 515 U.S. at 834.

Third, the nature of the line-drawing is different and intrinsically more complex in a university setting than in a union or bar association context. In the *Abood* line of cases, the

germaneness inquiry focuses on whether an expenditure bears a substantial relationship to the union's mission of bargaining collectively for all employees. Courts closely administer the union-fee line-drawing process, both out of necessity, since there is no other entity that can be trusted to do it, and because the questions that arise -- whether expenditures fall within "the scope of traditional union activities," *Ellis*, 466 U.S. at 446 -- are well within the experience and competence of the courts to resolve.

In marked contrast, the judgments called for in student fee cases hinge on whether the funded activity advances the university's educational mission -- a mission "much broader than the goals of a labor union and state bar" and "inextricably connected with the underlying policies of the First Amendment." *Rounds*, 166 F.3d at 1039. On that issue, courts owe considerable deference to the university. This Court has often admonished that courts should permit universities to define and carry out their own educational missions. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Widmar*, 454 U.S. at 268 n.5; *see also id.* at 279 n.2 (Stevens, J., concurring); *Healy*, 408 U.S. at 180-81; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). According deference to educational judgments does not denigrate students' First Amendment rights; on the contrary, exacting judicial review carries with it the significant possibility of dampening academic freedom -- a value also protected by the First Amendment. *Sweezy*, 354 U.S. at 250.

The point of this discussion is that, even accepting the Seventh Circuit's view that the *Abood* "germaneness" test plays a role in student fee cases, the test must be applied with, and tempered by, an appropriate recognition of the special role played by universities, which is very different from that of labor

unions or bar associations. After all, it is our nation's universities, not our courts, that are responsible for instilling the citizenship skills students will need as our nation's next generation of leaders. The University of Wisconsin believes that the forum it has created to foster debate and give students the opportunity to play leadership roles in their own organizations is integral to the educational mission of the University. That is a judgment that courts should be, and rightly have been, hesitant to overturn. *See Keyishian*, 385 U.S. at 603. As the Third Circuit put it in *Galda I*, a University's determination of germaneness should be viewed as "presumptive[ly] valid," and set aside only in the rarest instance. 686 F.2d at 166. Because there is no reason to disturb the University's judgment in this case, the Seventh Circuit's decision should be reversed.

III. The Relief Respondents Seek -- The Exclusion Of Certain Organizations From The University's Forum Because Of Their Political Or Ideological Orientation -- Is Incompatible With The First Amendment.

This Court should reverse the judgment below for the reasons outlined in the previous sections of this brief. But if the Court finds that there is any merit to respondents' claim, and *amici* submit that there is none, then the Court must address whether the decision rendered by the Seventh Circuit itself raises constitutional concerns. The remedy ordered in this case -- an injunction forbidding the University from allowing certain organizations to use student fee money to engage in political or ideological activities -- violates the First Amendment rights of those organizations and students that wish to associate with

them.[8]

Although respondents wrap their claim in the language of the First Amendment, it is apparent that they are seeking to use this litigation to silence the voices of those campus organizations with which they disagree. Respondents do not contest that they and the organizations they support have the same access to funding under the student activity fee system as the groups they oppose. The student body and the democratically-elected student government have voted in favor of permitting the targeted organizations to participate in the fee system. Hundreds of their fellow students are involved in the activities sponsored by these organizations. *Cf. Rounds*, 166 F.3d at 1039; *Carroll I*, 957 F.2d at 999-1003. Nonetheless, respondents seek to exercise the proverbial heckler's veto and thereby muzzle these organizations simply because respondents disagree with their messages. The courts should be wary about intervening in a campus dispute that pits one group of students

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[8] *Amici* recognize that the objecting students argue that they are looking for relief only with respect to the *pro rata* share of their fees that go to support the political or ideological work of the organizations that take positions offensive to them. But that argument begs the point. Universities establish mandatory student fees to fund these activities precisely because they recognize that, left to their own devices, students might choose to be "free riders," which would cripple the creation of the forum. Moreover, a university-sponsored forum permits an allocation of funds in a counter-majoritarian way, which ensures that minority voices are not drowned out. And finally, given the small dollar amounts at issue, there is a real concern that the cost of apportioning these fees would dwarf any rebate or refund.

against another, particularly where, as here, each group has equal access to the forum and there is no claim that the forum is being unfairly administered.

Although there are a number of gray areas in First Amendment jurisprudence, it is settled beyond any doubt that a university may not discriminate against speakers based on the speakers' message. *Rosenberger*, 515 U.S. at 829-31 (collecting cases). Once a university has opened up a limited public forum, as the University indisputably has done here, it may not preclude speech on the basis of its viewpoint. *Id.; see also, e.g., Gohn*, 850 F.2d at 366; *Tipton*, 15 F.3d at 927.

Respondents are urging this Court to affirm an order requiring the University to do precisely what the First Amendment forbids -- to engage in content control to stifle expression that respondents oppose. This was Judge Arlin Adams' concern in his dissent in *Galda II*, where he observed that the majority "orders a state university to exclude . . . [from a fee] arrangement a group that repeatedly has met all objective requirements of an equal access forum, and that concededly provides substantial educational benefits to the students, simply because the content or objectives of the group's speech are too 'political.'" 772 F.2d at 1072. That result, Judge Adams wrote, "strikes at the heart of the freedom to speak." *Id. (quoting Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 535 (1980)). Given the facts of this case, the relief respondents seek -- the exclusion of a few speakers in a forum of more than one hundred -- calls into question respondents' entire legal theory.

CONCLUSION

For the reasons set forth above, the judgment below should be reversed.

Respectfully submitted,

David C. Vladeck
(Counsel of Record)
Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001
(202) 588-1000

Attorneys for *Amici Curiae* United States Student Association, *et al.*,

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IN THE
Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *et al.*,
Petitioners,
v.
SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

ROBERT H. CHANIN *
ANDREW D. ROTH
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

MICHAEL D. SIMPSON
CYNTHIA M. CHMIELEWSKI
NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 822-7035

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

This brief *amicus curiae* is filed by the National Education Association ("NEA") with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*[1]

NEA is a nation-wide employee organization with approximately 2.4 million members, the vast majority of whom are employed by public educational institutions—including public colleges and universities. Particularly be-

[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or filing of this brief.

cause of this latter constituency, NEA has a strong interest in whether and to what extent the First Amendment rights of students impact on the ability of public colleges and universities to expend mandatory student activity fees to implement educational programs and otherwise fulfill their educational missions. This case necessarily will provide guidance as to that issue.

SUMMARY OF ARGUMENT

The threshold task in this case is to determine the appropriate analytical framework to apply in dealing with respondents' challenge to the use of their mandatory student activity fees by the Board of Regents of the University of Wisconsin System. The court below concluded that "the issue before us is properly reviewed under the authority of *Abood* [*v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)] and *Keller* [*v. State Bar of Cal.*, 496 U.S. 1 (1990)]," 151 F.3d 717, 723 (7th Cir. 1998)—and it applied the "germaneness analysis" that originated in those cases and was developed by their progeny, particularly *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991). As demonstrated by petitioners and their other supporting *amici*, the Seventh Circuit misapplied this analysis, and the decision of that court therefore is wrong even when judged on its own terms.

This Court need not reach that question, however, because the Seventh Circuit's fundamental premise—*i.e.*, that the *Abood/Keller* "germaneness analysis" is controlling—is itself wrong. This is not to suggest that *Abood* and *Keller* are not relevant here. They are indeed relevant—and dispositive—but not because of the legal principle relied upon by the court below. In his opinion concurring in the judgment in *Abood*, Justice Powell agreed that "[c]ompelled support of a private association" impinged upon the First Amendment rights of those persons being

compelled, but he emphasized that such compelled support "is fundamentally different from compelled support of government." 431 U.S. at 259 n.13. In *Keller*, this Court unanimously embraced this critical distinction drawn by Justice Powell, noting that "government as we know it" would be "radically transformed"—indeed, "'could not function'"—if every person had a First Amendment right to insist that public monies not be expended in a manner that he or she found politically or ideologically objectionable. *Id.* at 12-13 (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)).

It is this so-called "government speech" doctrine—rather than the "germaneness analysis"—that is applicable in the instant case. The University of Wisconsin Board of Regents is a "traditional governmental agenc[y]," *Keller*, 496 U.S. at 12, which—in the exercise of its statutory authority to provide a system of public higher education for the people of Wisconsin—has chosen to establish a program pursuant to which mandatory student activity fees are used to fund the activities of on-campus student organizations representing a broad cross-section of American society. Whether financial sponsorship of such a program is a wise exercise of the Board's statutory authority may be open to debate. But under the government/non-government distinction drawn by Justice Powell in *Abood* and embraced by this Court in *Keller*, that debate must take place in a political forum, and not in the federal courts under the guise of a First Amendment challenge.

ARGUMENT

I.

The Wisconsin Legislature has determined that it is "in the public interest to provide a system of higher education which enables students of all ages, backgrounds and levels

of income to participate in the search for knowledge and individual development." Wis. Stat. § 36.01 (1998). The legislatively-assigned mission of that system—"to be known as the university of Wisconsin system," *id.* § 36.03—is as follows:

> [T]o develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. [*Id.* § 36.01(2).]

The Wisconsin Legislature has vested primary responsibility for governance of the University of Wisconsin system in a Board of Regents. Wis. Stat. § 36.09(1). The Board of Regents has the power, *inter alia*, to establish "tuition and fees incidental to enrollment in educational programs or use of facilities in the system," *id.* § 36.27(1), and to determine how those monies are to be expended. However, with respect to the use of mandatory student activity fees—"which constitute substantial support for campus student activities"—the Board of Regents is required by statute to act in consultation with the students, in recognition of the students' "primary responsibility for the formulation and review of policies concerning student life, services and interests." *Id.* § 36.09(5).

The Board of Regents has for nearly twenty-five years administered a program pursuant to which a portion of the mandatory student activity fees is used to fund extracurricular student activities. This program is identical in all relevant respects to the University of Virginia pro-

gram that was before this Court in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). Like the program in *Rosenberger*, the University of Wisconsin program uses these fees to defray the expenses of registered on-campus student organizations of various kinds, in order "to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life." 515 U.S. at 840. As such, the University of Wisconsin program—again like the University of Virginia program—"reflect[s] the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." *Id.*

Respondents—a group of students at the University of Wisconsin-Madison—have sued the Board of Regents, claiming an infringement of their First Amendment rights to the extent that their mandatory student activity fees are used by the Board to fund on-campus student organizations "that engage in political and ideological advocacy, activities and speech" to which respondents are opposed. *Southworth v. Grebe*, 151 F.3d 717, 718-19 (7th Cir. 1998).[2]

II.

Acknowledging that this Court "has yet to determine" whether the First Amendment provides a basis for the type of challenge here asserted by respondents, the Sev-

[2] Although respondents have disavowed any challenge to the use of their fees to fund the University-wide student newspaper or the Distinguished Lecture Series, *see* 151 F.3d at 721, 727 n.8, respondents' position necessarily would permit such a challenge—unless one indulges in the fantasy that the student newspaper has no discernible editorial viewpoint and the distinguished lecturers express no opinions on controversial issues.

enth Circuit found that *Rosenberger* "provide[s] guidance on the appropriate analysis for such a challenge." 151 F.3d at 722. According to the court below, *Rosenberger* "direct[s] us" to the "germaneness analysis" that originated in *Abood* and *Keller*, and was further developed in *Lehnert*. *See* 151 F.3d at 722-724. Applying that analysis, the Seventh Circuit concluded that respondents have a cognizable "First Amendment interest" in conscientiously objecting to payment of that portion of their mandatory student activity fees that is used to fund on-campus student organizations that they oppose—a "First Amendment interest" that, in the Seventh Circuit's view, is not overcome by the Board of Regents' asserted interest in furthering its educational mission. 151 F.3d at 724-31.

The foregoing conclusion is in error because its foundational premise is fatally flawed: this case is *not* controlled by the *Abood/Keller* "germaneness analysis," which is bottomed on the principle "that individuals have a First Amendment interest in freedom from compulsion to subsidize speech and other expressive activities *undertaken by private and quasi-private organizations*." *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 481-82 (1997) (Souter, J., dissenting) (emphasis added). What students at the University of Wisconsin are being compelled to subsidize is a program of sponsorship of extracurricular student activities *undertaken by the State of Wisconsin* in the exercise of the State's judgment that such a program is in the public interest. In this context, it is abundantly clear from Justice Powell's concurring opinion in *Abood* and this Court's unanimous opinion in *Keller* that the students have *no* "First Amendment interest in freedom from compulsion to subsidize" elements of that government program that they may find politically or ideologically offensive.

A. In *Abood*, the issue was whether the First Amendment was violated by the compelled payment of service fees *to a labor union* under a Michigan labor relations statute authorizing "agency shop" agreements between public employers and unions representing public employees. The *Abood* Court found that the compelled payment of such fees had "an impact upon" the plaintiff employees' "First Amendment interests," because "[a]n employee may very well have ideological objections to a wide variety of activities *undertaken by the union* in its role as exclusive representative." 431 U.S. at 222 (emphasis added). This Court went on to hold that the validity *vel non* of the compelled payment of the service fees under the First Amendment turned on the purposes for which the union expended those fees. If those purposes were "germane to its duties as collective-bargaining representative," *id.* at 235, the compelled payment passed constitutional muster because of the "important government interests"—*i.e.*, labor peace and the avoidance of "free-riders"—furthered thereby. *Id.* at 224-25. Conversely, the compelled payment of service fees to be used "for political and ideological purposes unrelated to collective bargaining" was found impermissible under the First Amendment because no comparable governmental interests were furthered by such expenditures. *Id.* at 232-37.

In his opinion concurring in the judgment, Justice Powell agreed that "[c]ompelled support of a private association" impinged upon the First Amendment interests of those persons being compelled, but pointedly noted that such compelled support

> *is fundamentally different from compelled support of government*. Clearly, a local school board does not need to demonstrate a compelling state interest every time its spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting

> the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. [431 U.S. at 259 n.13 (emphasis added).]

In *Keller*, members of the State Bar of California, relying on *Abood*, brought a First Amendment challenge to the use of their compulsory bar association dues "to finance certain ideological or political activities to which they were opposed." 496 U.S. at 4. The California Supreme Court found *Abood* inapposite on the ground that the State Bar was a governmental agency and, as such, free without First Amendment "constraints" to expend its revenue "for any purposes within its authority," including purposes that some might find offensive. *Id.* at 10 (quoting 767 P.2d 1020, 1029). On writ of certiorari to this Court, the State Bar invoked this so-called "government speech" doctrine:

> "The government must take substantive positions and decide disputed issues to govern. . . . So long as it bases its actions on legitimate goals, government may speak despite citizen disagreement with the content of its message, for government is not required to be content-neutral." Brief for Respondents 16. See also *Abood, supra*, at 259, n.13 (Powell, J., concurring in judgment) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people"). [496 U.S. at 10-11.]

Although the *Keller* Court in a unanimous opinion rejected the position of the State Bar of California and reversed the California Supreme Court, it did *not* take

issue with the "government speech" doctrine as such, or with that doctrine's rationale as explicated by Justice Powell in footnote 13 of his *Abood* concurrence. To the contrary, this Court fully embraced the "government speech" doctrine—and, indeed, elaborated upon its rationale—but concluded that the State Bar was not properly treated as "government" for purposes of applying the doctrine:

> [T]he very specialized characteristics of the State Bar of California discussed above serve[] to distinguish it from the role of the typical government official or agency. Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. Cf. *United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional governmental agencies and officials on the

> other hand, render unavailing [the State Bar's] argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees. [496 U.S. at 12-13.][3]

B. It is clear from the foregoing that the court below was mistaken in its foundational premise that the *Abood/Keller* "germaneness analysis" is controlling here. This is *not* a case of compelled funding of a private association of employees "which is representative only of one segment of the population, with certain common interests," *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment), or of a quasi-private state bar comprised of attorneys providing only "specialized professional advice to those with the ultimate responsibility of governing the legal profession," *Keller*, 496 U.S. at 13. It is, rather, a case of compelled funding of a "traditional governmental agenc[y]," *id.* —the University of Wisconsin Board of Regents—charged by statute with the responsibility of providing a system of public higher education for the people of Wisconsin. In short, this case arises in a "fundamentally different" context than *Abood* and *Keller*, and should be decided by the application of the legal principle that is appropriate in that context. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment).

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[3] In *Glickman*, this Court recently found *Abood* and *Keller* controlling in the context of a First Amendment challenge to agricultural marketing orders which—as approved by the Secretary of Agriculture—compelled growers, handlers and processors of California tree fruits to contribute to the cost of generic advertising of California nectarines, plums and peaches, 521 U.S. at 471-74, but this decision does not undermine the distinction that we urge in text. Although the Secretary of Agriculture might have argued that the case was controlled by the "government speech" doctrine rather than the *Abood* and *Keller* "germaneness analysis," he expressly waived the argument, and this Court did not consider the point. *See* 521 U.S. at 482 n.2 (Souter, J., dissenting).

The applicable legal principle is that individuals have *no* "First Amendment interest in freedom from compulsion" to pay a *governmental* assessment based upon political or ideological objections to the manner in which the resulting revenues are expended *by the government*. Although this Court reversed the California Supreme Court in *Keller*, it had no quarrel with that court's observation that " '[a] governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority,' " 496 U.S. at 10 (quoting 767 P.2d at 1029), without subjecting itself to the kind of First Amendment conscientious-objection challenge upheld in *Abood* and *Keller*.

III.

In opining that compelled support of a private organization should be treated differently from compelled support of government for First Amendment purposes, Justice Powell offered the following rationale: because government acts in a *representative* capacity on behalf of *all* the people within a jurisdiction, each and every person within the represented class properly can be deemed to have consented to the government's tax and spending policies, without regard to whether he or she personally objects to some or all of those policies.[4] "The same cannot be said of [the expenditure of service fees by] a union, which is representative only of one segment of the population, with certain common interests." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment).

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[4] To be sure, that consent would not extend to government tax or spending policies that worked an *independent* violation of the Constitution—such as, to provide an extreme example, a discriminatory tax on African-Americans in violation of the Fourteenth Amendment—for there the government would be exceeding the bounds of its consented-to representative authority.

This rationale plainly applies here. The Board of Regents is the governmental agency charged with the statutory responsibility to provide the people of Wisconsin with "a system of [public] higher education which enables students of all ages, backgrounds and levels of income to participate in the search for knowledge and individual development." Wis. Stat. § 36.01. The Board of Regents has chosen—in the exercise of that responsibility—to establish a program under which all students attending the University of Wisconsin are given the opportunity to be exposed to the viewpoints—and participate in the real-world activities—of a myriad of on-campus student organizations representing a broad cross-section of American society, and to fund that program by means of a mandatory student activity fee. Whether financial sponsorship of such a program is a wise exercise of the Board of Regents' statutory authority to represent the people of Wisconsin in matters pertaining to public higher education may be open to debate. But it cannot be debated that the Board of Regents has in fact acted in a representative capacity in establishing and maintaining such a program. That being so, the remedy for those persons who find the Board of Regents' program offensive or misguided in whole or in part lies in the normal political channels, and not in the federal courts under the guise of a First Amendment conscientious-objection challenge.

In its unanimous opinion in *Keller*, this Court cited approvingly to footnote 13 of Justice Powell's *Abood* concurrence, *see* 496 U.S. at 11, but it did not stop there. The *Keller* Court went on to observe that "government as we know it" would be "radically transformed"—indeed, "'could not function'"—if every person had a First Amendment right to insist that public monies not be spent in a manner contrary to his or her views or beliefs. *Id.*

at 12-13 (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)). This additional rationale for treating compelled support of a private organization differently than compelled support of government for First Amendment purposes—like Justice Powell's rationale—is unassailable:

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never been so exalted above the powers and the compulsion of the agencies of government. [*Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 268 (1934) (Cardozo, J., concurring).]

Indeed, one need not venture very far from the facts of this case to demonstrate the "lengths" to which recognition of the First Amendment right claimed by respondents "would carry us":

> [T]he University of Wisconsin obviously compels its students to make other payments as well, notably tuition. . . . The University uses [tuition] for its operations, and the lion's share of the budget in most universities goes to faculty salaries and research support. Some students undoubtedly find the viewpoints of some faculty members, expressed either in the classroom or in scholarship, to be offensive. Suppose, for example, there is a doctor in the medical school researching more effective ways to use fetal tissue for organ transplants. It is easy enough to imagine a student finding this antithetical to her religious or moral views. Or suppose the University disburses tuition funds to a sociologist who is exploring the hypothesis that children suffer long-term harm

> if their mothers work while the child is still under the age of 10. A different student may find that equally offensive. [*Southworth v. Grebe*, 157 F.3d 1124, 1128 (7th Cir. 1998) (D. Wood., J., dissenting from denial of rehearing *en banc*).]

See also Lathrop v. Donohue, 367 U.S. 820, 860 (1961) (Harlan, J., concurring in judgment) ("Nor do I . . . believe that a state taxpayer could object on Fourteenth Amendment grounds to the use of his money for school textbooks or instruction which he finds intellectually repulsive, nor for the mere purchase of a flag for the school.").

IV.

The court below accepted (at least for purposes of argument) the principle that there is no First Amendment right to object on political or ideological grounds to the government's "appropriation of public funds raised through *taxation*." 151 F.3d at 732 (emphasis added). But the court found that that principle did not shield the Board of Regents from the First Amendment challenge in this case because the mandatory student activity fee

> does not equate to a tax. *Rosenberger* made this clear, stating that "the $14 paid each semester by the students is not a general tax designed to raise revenue for the University. . . . Our decision, then, cannot be read as addressing an expenditure from a general tax fund." *Rosenberger*, 515 U.S. at 841. [151 F.3d at 732.]

This analysis is flawed even on its own terms, because it assumes—incorrectly—that the University of Wisconsin's mandatory student activity fee is not a "tax." Black's Law Dictionary 1457 (6th ed. 1990) defines a "tax" as follows (quoting Story, Const. § 950):

> In a general sense, any contribution imposed by government upon individuals, for the use and service of

> the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name.

See also Rosenberger, 515 U.S. at 890 (Souter, J., dissenting).

Nor is this definition at odds with the position that this Court took in *Rosenberger*. We note initially that *Rosenberger* was an Establishment Clause case. In this uniquely sensitive—and somewhat murky—area of First Amendment jurisprudence it is understandable that this Court would seek to limit its holding to the facts presented, lest it be inappropriately extended to other contexts in which public financial aid to sectarian institutions "would run contrary to Establishment Clause concerns dating from the earliest days of the Republic." 515 U.S. at 840. Accordingly, the *Rosenberger* Court chose its words with particular care, refusing to equate the student activity fee in that case with "a general tax," *id.* at 841—*i.e.*, one which can be used for unlimited purposes —and cautioning in turn that its decision should not "be read as addressing an expenditure from *a general tax fund*." *Id.* (emphasis added). *Rosenberger* did not present—much less answer—the question of whether the University of Virginia's student activity fee could be equated with *any* type of tax for *any* purpose.

But even if, for argument's sake, we were to answer the latter question "no"—and proceed on the assumption that the Univerity of Wisconsin's mandatory student activity fee cannot be equated with any type of tax for any purpose—the outcome here would be the same, inasmuch as there is nothing in the "government speech" doctrine to suggest that it applies only to revenue derived from "taxation." Indeed, the teaching of *Keller* is to the contrary. The doctrine presumably would have applied

in that case if the California State Bar had been deemed to constitute a "traditional governmental agenc[y]," 496 U.S. at 13, notwithstanding the fact that there is no principled distinction between compulsory bar association dues and mandatory student activity fees. Moreover, the *Keller* Court quoted with approbation, 496 U.S. at 10, the California Supreme Court's observation that "[a] governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purpose within its authority" without subjecting itself to a First Amendment conscientious-objection challenge.

V.

As we have shown, students at the University of Wisconsin do not have a First Amendment right to object to the government program at issue in this case any more than does a citizen to object to the decision of government to spend his or her money "in furtherance of a war, whether for attack or defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral," *Hamilton v. Regents, supra*, 293 U.S. at 268. But the analogy is not a perfect one, and we would be remiss if we did not point out that respondents in fact have *less* cause to complain of a First Amendment violation than do anti-war taxpayers or other similarly-situated conscientious objectors.

Under *Rosenberger*, a public university operating a government program of the type at issue here is bound independently by the First Amendment to fund on-campus student organizations on a viewpoint-neutral basis, notwithstanding the usual rule that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." 515 U.S. at 832-35; *see also National Endowment for the Arts v.*

Finley, 524 U.S. 569, 118 S. Ct. 2168, 2178-79 (1998); *id.* at 2184 (Scalia, J., concurring); *id.* at 2190-93 (Souter, J., dissenting). Accordingly, respondents "could presumably form their own student group and receive funds for the expression of" viewpoints contrary to those of the on-campus student organizations that they oppose, and, indeed, "some [respondents] belong to a group [*i.e.*, the Federalist Society] that already does so." *Southworth*, 157 F.3d at 1127 (Rovner, J., dissenting from denial of rehearing *en banc*). In these circumstances, respondents hardly can lay legitimate claim to greater First Amendment rights than a run-of-the-mill conscientious objector who—if offended by a government program—cannot even demand an "offsetting" expenditure.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

ROBERT H. CHANIN *
ANDREW D. ROTH
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

MICHAEL D. SIMPSON
CYNTHIA M. CHMIELEWSKI
NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 822-7035

* Counsel of Record

No. 98-1189

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Supreme Court of the United States

OCTOBER TERM, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, et al.,

Petitioners,

—v.—

SCOTT HAROLD SOUTHWORTH, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NEW YORK PUBLIC INTEREST RESEARCH GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ALEXANDER R. SUSSMAN
Counsel of Record
MICHAEL BIRNEY DE LEEUW
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
(A Partnership Including Professional Corporations)
One New York Plaza
New York, New York 10004-1980
(212) 859-8000

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The New York Public Interest Research Group ("NYPIRG") submits this brief as *amicus curiae*, pursuant to Supreme Court Rule 37.3(a). The consents of both the petitioners and the respondents have been obtained and are on file with this Court. NYPIRG submits its brief in support of the petitioners, the Board of Regents of the University of Wisconsin System, et al.

NYPIRG is a nonprofit, nonpartisan organization directed by New York State college and university students and has nineteen local chapters on college campuses across New York State, including campuses within the State University of New York ("SUNY") system. NYPIRG's Board of Directors is composed of elected student representatives from colleges and universities throughout the state. Part of NYPIRG's mission is to train students in the skills of citizenship and advocacy through hands-on experience. NYPIRG teaches students a variety of skills and allows them to put the learning that they receive in the classroom into practice. Students who choose to participate in NYPIRG's activities learn important skills such as research, writing, and public speaking.[2] These students also learn community organization skills and participate directly in the process of civic governance. *See generally Carroll v. Blinken*, 957 F.2d 991, 1000 (2d Cir.) (citing *Carroll v. Blinken*, 768 F. Supp. 1030, 1032 (S.D.N.Y. 1991)), *cert. denied*, 506 U.S. 906 (1992).

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] NYPIRG's activities at SUNY Albany during the 1997-98 academic year included: a campaign to improve on-campus recycling; running an environmental fair; managing a Small Claims Court Action Center; organizing a book-exchange for students; and producing consumer guides for SUNY Albany students.

Part of NYPIRG's operating budget derives from mandatory student fees collected from students on the campuses at which NYPIRG has a chapter. Dissenting students at SUNY Albany challenged NYPIRG's funding on the same grounds that respondents have challenged the funding system at the University of Wisconsin. After a trial, the district court and then the Second Circuit found that the use of mandatory fees to fund NYPIRG was constitutional. *See Carroll v. Blinken*, 957 F.2d 991, 1000 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992). The funding system at the University of Wisconsin, which the Seventh Circuit found unconstitutional in *Southworth v. Grebe*, 151 F.3d 717, 719-721 (7th Cir. 1998) , *cert. granted*, 119 S. Ct. 1332 (1999), is essentially the same as the one that the Second Circuit found constitutional in *Carroll*, 957 F.2d 991.

Unlike the Seventh Circuit, the Second Circuit weighed the competing First Amendment interests of all the parties and determined that the university's and the student body's interests in fostering a diverse and unfettered marketplace of ideas outweigh the First Amendment interests of dissenting students, so long as the mandatory fee was used to support campus-based activities. That ruling strikes the proper balance between the interests of the university and objecting students. Since this rule has been in place, no student has challenged the operation of the SUNY Albany funding system and there has been no litigation as a result.

In light of its experience in addressing the same issues that are presented here—including a full trial before a district court and three separate appeals to the Second Circuit—NYPIRG believes it can provide a useful perspective on the First Amendment issues presented in this case. Additionally, because of the similarities between the funding system at the University of Wisconsin and the funding system at SUNY Albany, NYPIRG has a direct interest in the proper resolution of this case.

SUMMARY OF ARGUMENT

The Second Circuit's rulings in the *Carroll v. Blinken* litigation highlight the deficiencies of the Seventh Circuit's ruling below. The Seventh Circuit has given precedence to an individual student's objection to "political" or "ideological" speech over the university's reasons for creating a viewpoint-neutral forum for the benefit of all students at the university. The Seventh Circuit's approach jeopardizes rather than protects free speech because it allows individual students' objections to sterilize campus speech and invites a tyranny of the majority to stifle the speech of disfavored campus groups. The ruling below also intrudes insidiously on the educational judgments and prerogatives of the State of Wisconsin and its state university. Furthermore, the Seventh Circuit's holding requires the University of Wisconsin to engage in unconstitutional viewpoint-based discrimination against student groups that it deems to be engaging in "political" or "ideological" speech.

By contrast, the Second Circuit, when faced with a similar challenge, balanced the important First Amendment interests of the dissenting students, the university, and the student body as a whole and determined that the university's interests—(a) the promotion of extracurricular activities; (b) the facilitation of participatory civics training; and (c) the stimulation of robust debate—outweighed the individual students' rights to be free from compelled speech. The Second Circuit properly deferred to the educational judgment of the university, insisting only that the university ensure that a dissenting student's money be used to support campus-based activities.[3] Significantly, the Seventh Circuit issued its injunction affecting

[3] The Second Circuit later clarified that by "on campus" it did not intend to impose any geographic restrictions on the use of mandatory student fees; indeed, the term was a "convenient shorthand for referring to expenditures that further the substantial interests of SUNY Albany." *See Carroll v. Blinken*, 42 F.3d 122, 127 (2d Cir. 1994).

numerous student groups without the benefit of any record or findings that those groups' activities did not enhance the University of Wisconsin's appropriate educational interests or the limited public forum that the university designated. Again, in contrast, the Second Circuit correctly found that the university itself should determine whether the activities of a particular student group further the university's significant interests.

The Second Circuit's holdings strike the proper balance between the interests of all parties, preserve the purpose and integrity of the forum funded by mandatory student fees, and do not force the university to engage in unconstitutional viewpoint-based discrimination against student groups. Moreover, the Second Circuit offered significant protections to the First Amendment rights of the dissenting students by requiring that the activities that are funded by the mandatory fees be campus-based activities that further the educational interests of the university. The Seventh Circuit, by contrast, misapplied the "germaneness" test by analyzing whether *student groups* rather than the *activities* in which those groups engaged were germane to the university's interests.

ARGUMENT

POINT I

THE SECOND CIRCUIT'S HOLDINGS IN *CARROLL v. BLINKEN* PROPERLY BALANCE THE FIRST AMENDMENT INTERESTS AT STAKE HERE, UNLIKE THE DECISION BELOW

In deciding that SUNY Albany's mandatory fee system was constitutional, the Second Circuit struck the proper balance between competing First Amendment interests by deferring largely to the university's educational judgment while ensuring that the rights of dissenting students are adequately protected. The Second Circuit carefully considered the competing First Amendment interests at stake and found that the best means both to protect those interests and avoid the kind of viewpoint-based discrimination that this Court later found unconstitutional in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), was to allow SUNY Albany broad discretion in creating and fostering a public forum for the benefit of all SUNY Albany students. At the same time, however, the Second Circuit protected the rights of dissenting students by holding that student groups that receive funding must use those funds for campus-based activities.

A. *Carroll I*

In *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992) ("Carroll I"), students at SUNY Albany challenged the use of their student activity fee to support NYPIRG.[4] The Second Circuit found that there were competing First Amendment interests involved and determined that those interests must be weighed against each other to determine the constitutionality of the funding mechanism. *See id.* at 995.

The Second Circuit afforded great weight to the dissenting students' First Amendment rights,[5] finding that even the small contribution that each SUNY Albany student indirectly made

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[4] In 1989, each student at SUNY Albany paid a $55.00 mandatory student fee. *Id.* at 993. This fee was then distributed to "a variety of extracurricular organizations, 'provided that the purpose and activities of the organization[s] are of [an] educational, cultural, recreational or social nature.' " *Id.*

[5] The Second Circuit possibly went too far in recognizing the dissenting students' rights to be free from compelled speech. Indeed, NYPIRG supports petitioners' argument that when a university creates a viewpoint-neutral limited public forum the infringement on dissenting students' First Amendment rights are so minimal and attenuated as not to constitute compelled speech at all.

to NYPIRG—and that NYPIRG then used for expressive activities—constituted some degree of compelled speech. *See id.* at 997. The court then noted that "it is against [the dissenting students'] right to be free of compelled speech that we weigh the university's interests in compulsion." *Id.* at 995.

In analyzing SUNY Albany's interests in funding NYPIRG, the court noted that the funding provision was "not intended to restrict free speech. On the contrary, it seeks to expand campus speech by facilitating the activities of a wide variety of speakers." *Id.* at 999. The court also determined that the university operated this limited public forum in a viewpoint-neutral manner because it did not grant or withhold funds based upon the viewpoint or content of a recipient's speech. *See id.* The court then applied a test that is used to determine the constitutionality of limited public fora and looked to "whether the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985), and citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989); *Schad v. Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981); *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

Applying this standard, the court recognized that SUNY Albany had three distinct interests in maintaining its funding system: "1) the general promotion of extracurricular activities, 2) the facilitation of what the district court called 'participatory civics training,' and 3) the stimulation of robust campus debate on a variety of public issues." *Carroll I*, 957 F.2d at 999 (citation omitted). The court then found that funding NYPIRG through mandatory student fees furthered each of these interests.

First, the court found that SUNY Albany's mandatory student fee supports a system "whereby a multitude of political, educational, social and recreational organizations receives funds" and which was intended to further "a particular and of

course quite common vision of the university as more than the sum of classes in its course catalog—as a sort of sanctuary where young adults grow in a myriad of ways." *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring)). The court found that the allocation to NYPIRG "is consistent with the university's desire to enrich the overall extracurricular lives of students." *Id.*

Second, the court found that SUNY Albany's interest in educating its students was furthered by NYPIRG because NYPIRG "teaches specific, concrete skills—research, speaking, writing, organization and advocacy." *Id.* Third, the court found that the most important interest that was furthered by SUNY Albany's funding of NYPIRG was the stimulation of "uninhibited and vigorous discussion on matters of campus and public concern." *Id.* The court found that

> SUNY Albany's interest in sponsoring and maintaining a thriving campus forum of vigorous advocacy and political action is itself a concern of constitutional dimensions, since a central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate.

Id. at 1001 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The court concluded that these three factors were "substantial enough to justify the infringement of [the dissenting students'] First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG." *Id.*

Because NYPIRG has a statewide structure, the court was presented with the issue of NYPIRG's possible use of funds for activities *not* related to SUNY Albany student activities, an issue not presented in this case. The court afforded generous protection to the dissenting students' claims: "we are mindful of our duty to ensure that even incidental burdens on

[the dissenting students'] speech be narrowly drawn. . . . Hence we are unwilling to go farther than necessary to fulfill SUNY Albany's substantial interest, and do not believe that these concerns can justify NYPIRG's off campus expenditures." *Id.* at 1002 (citations omitted). The court compared NYPIRG's off campus expenditures with the union acts that are "outside the limited context of contract ratification or implementation"—or non-germane activities—in the agency shop cases. *See id.* at 1002 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-22 (1991); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12 (1990)).

Even with the generous consideration given to the individual students' objections, the Second Circuit held that SUNY Albany could constitutionally allocate dissenting students' activity fees to NYPIRG so long as NYPIRG spent the money that it received from students on campus-based activities.[6] *See id.* at 995-1003. It was later determined by the district court[7] and later on appeal that NYPIRG had complied with the court's mandate.[8] *See Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994).

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[6] The court also ruled that NYPIRG could not constitutionally define its membership as all students enrolled in the University (and therefore required to pay the student activity fees), and could extend membership only to those who actively sought it. *Carroll I*, 957 F.2d at 1003.

[7] The district court found that "NYPIRG was already in compliance with the requirement that it spend as much money at SUNY Albany as it receives in student activity fee." *See Carroll v. Blinken*, 42 F.3d 122, 125 (2d Cir. 1994).

[8] In the years between the decision in *Carroll I* and the pending *Southworth* litigation, SUNY Albany has required annual reports of NYPIRG's activities at SUNY Albany that were supported by the allocated student activity fees. No SUNY Albany student has objected to the funding of NYPIRG's activities and no litigation has been brought since *Carroll I*.

B. *Carroll II*

The holding in *Carroll I* was clarified without substantial change in *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) ("*Carroll II*"). In *Carroll II*, the Second Circuit made clear that SUNY Albany was not required to impose a *geographic* restriction on the activities of a funded student organization—but required SUNY Albany to conduct a fact-specific inquiry to ensure that the activities of any given organization, including NYPIRG, further the "substantial interests of the university and its community that justify the curtailment of the students' First Amendment rights." *Id.* at 127 (Miner, J.). The court reiterated its unwillingness to micromanage the affairs of universities and student organizations and set forth a general standard that SUNY Albany should follow in determining whether particular activities should be funded with mandatory student fees. *See id.* at 128.

The court held that student groups could use mandatory student fees for any of the following: "(1) activities that foster a 'marketplace of ideas' on the SUNY Albany campus; (2) activities that provide SUNY Albany students with hands-on educational experiences; and (3) extra-curricular activities for SUNY Albany students, both on and off the Albany campus, that fulfill SUNY educational objectives." *See id.* at 128.

C. The Second Circuit's Holdings in *Carroll I* and *Carroll II* Strike the Proper Balance Between the Interests of All Parties

Unlike the Seventh Circuit in *Southworth*, the Second Circuit recognized this Court's tradition of "accord[ing] wide latitude to universities to define and carry out their own educational missions." *Carroll I*, 957 F.2d at 999 (citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978)). The Second Circuit also applied this Court's well-settled principle that colleges and universities have the right to use broad discretion in formulating their

educational mission, which includes the right to promote vigorous debate amongst the student body. *See Carroll I*, 957 F.2d at 999-1001 (citing *Widmar v. Vincent*, 454 U.S. 263, 267-68 n.5 (1981); *Healy v. James*, 408 U.S. 169, 180 (1972); *Keyishian v. Board of Regents of State of New York*, 385 U.S. 589, 603 (1967)).

Accordingly, the Second Circuit thoughtfully weighed the competing First Amendment interests of *all the parties* involved and found that the university's interests were substantial enough to justify the infringement of appellants' First Amendment rights. *See Carroll I*, 957 F.2d at 1001. This solution is superior to the Seventh Circuit's holding in *Southworth* in three important ways. First, it preserves the purpose and integrity of the limited public forum by allowing the university to foster the marketplace of ideas. Second, it protects dissenting students' First Amendment rights by ensuring that funded activities further the university's significant interests. And third, unlike the Seventh Circuit's holding in *Southworth*, it does not require the university to engage in viewpoint discrimination but allows all groups to be eligible for funding, regardless of viewpoint so long as the funded activities further the university's interests.

This result is also supported by public forum case law. The result in *Carroll I* is entirely consistent with this Court's holding three years later in *Rosenberger*, 515 U.S. 819 (1995). In *Rosenberger*, this Court found that a mandatory student activity fee similar to the one challenged in both *Carroll I* and *Southworth* created a non-traditional public forum. *See id.* at 829-30. This Court further found that a public forum created through the use of mandatory student activity fees must be administered in a content- and viewpoint-neutral manner to avoid discrimination between viewpoints, which would run afoul of the First Amendment. *See id.* at 837; *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (holding that "it discriminates on the basis of viewpoint to permit school property to be used for the pre-

sentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint").

The Second Circuit properly focused on the activities of the groups in question—rather than the groups themselves—allowing the university to foster a diverse marketplace of ideas without engaging in the type of viewpoint-based discrimination that is *required* under the Seventh Circuit's opinion in *Southworth*. *See Southworth*, 151 F.3d at 733 (requiring the University of Wisconsin to review each student organization to avoid "fund[ing] organizations which engage in political or ideological activities, advocacy, or speech").[9] The *Carroll* solution recognizes, where the *Southworth* solution does not, that requiring the university to examine and monitor each student group and then ferret out those that could conceivably engage in political or ideological speech requires the very type of state supervision and value judgment against which the First Amendment was designed to protect.[10]

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[9] *See also* Kari Thoe, Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled Speech Rights at American Universities*, 82 Minn. L. Rev. 1425, 1459-60 (1998) (advocating "activities-based exclusions" from the limited public forum rather than "group-based" exclusions).

[10] As Justice Brandeis wisely noted in *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring):

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through

This Court should therefore reject the analysis and conclusions of the Seventh Circuit in *Southworth* and take the Second Circuit's approach in *Carroll I* and *Carroll II* because it is more consistent with this Court's precedent and creates a workable, constitutional remedy for any potential First Amendment violations.

POINT II

THE UNIVERSITY OF WISCONSIN MAY NOT, CONSISTENT WITH THE FIRST AMENDMENT, BE REQUIRED TO DETERMINE WHICH GROUPS ENGAGE IN "POLITICAL" OR "IDEOLOGICAL" ACTIVITIES AND THEN RESTRICT FUNDING OF THOSE GROUPS FROM THE SEGREGATED FEE

The decision below mandates an unacceptable result whereby the University of Wisconsin is forced to identify, review, and refuse to fund those student organizations that engage in "political" or "ideological" speech. *See Southworth*, 151 F.3d at 735 ("We therefore hold that the Regents cannot use the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech, and they are hereby enjoined from doing so."). This result *requires* that the state engage in the very type of viewpoint-based discrimination that this Court found unconstitutional in *Rosenberger*, 515 U.S. 819 (1995).

The Seventh Circuit requires that all student groups be subjected to potential exclusion from the public forum if they choose to engage (or incidentally engage) in any political or ideological speech. This result is clearly antithetical to this

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public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Court's 1995 holding in *Rosenberger*. There, this Court unequivocally stated that the state may not "impose[ ] financial burdens on certain speakers based on the content of their expression." 515 U.S. at 828. By requiring universities to monitor the activities of each student organization that is eligible to receive a portion of the student activity fee, the *Southworth* remedy would leave universities with only two options: (1) to monitor each organization to ensure that students' funds are *never* used to support organizations whose speech could potentially be characterized as "political" or "ideological" by any faction of the student community; or (2) to shut down the forum in its entirety in recognition of the fact that, in any public forum, there will *always* be views with which some people disagree.

The first option, requiring the university to monitor student groups, is clearly irreconcilable with this Court's First Amendment jurisprudence and long-standing recognition of the academic freedom essential to the university community. *See, e.g., Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."); *Keyishian*, 385 U.S. at 603 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"); *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

This monitoring—and viewpoint-based restriction on funding eligibility—also requires the university to oversee and make value judgments regarding the *exact point* where a student organization's speech has become "too political" or "too

ideological." *See Galda v. Rutgers*, 772 F.2d 1060, 1072-73 (3d Cir. 1985) (noting that where a group has met the objective requirements to receive funding as part of a student forum, and the state denies funding to that group "simply because the content or objectives of the group's speech are too 'political,' [it] strikes at the heart of the freedom to speak." (Adams, J., dissenting)), *cert. denied*, 475 U.S. 1065 (1986); *see also* Kari Thoe, Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled Speech Rights at American Universities*, 82 Minn. L. Rev. 1425, 1452-53 (May 1998) ("While the *Southworth* remedy allows 'educational' views on world events or family planning, it does not allow so-called 'political' views on the same subjects. Thus, the remedy prohibits viewpoints on subjects 'otherwise within the forum's limitations.' " (citing *Rosenberger*, 515 U.S. at 829-30)).

The second option, which would require universities to shut down the forum completely in order to satisfy the concerns of a vocal minority of student dissenters, allows the proverbial "heckler's veto" of the *public forum itself*. Such a result flies in the face of this Court's long-standing recognition that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943), *aff'd*, 326 U.S. 1 (1945)). And, as this Court noted in *Rosenberger*:

> If the topic of the debate is, for example, racism, then exclusion of several views on the problem is just as offensive to the First Amendment as exclusion of only one. *It is as objectionable to exclude both* a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

517 U.S. at 831 (emphasis added). The remedy imposed by the *Southworth* court could easily devolve into just the type of universal exclusion of controversial ideas that was specifically denounced in *Rosenberger*. In addition, the remedy mandated below impedes the university's First Amendment interest in funding a forum robust with opposing viewpoints.

POINT III

THE LOWER COURT MISAPPLIED THE "GERMANENESS" TEST BY FOCUSING ON WHETHER PARTICULAR STUDENT GROUPS WERE GERMANE TO THE UNIVERSITY'S INTERESTS AS OPPOSED TO THE ACTIVITIES IN WHICH THOSE GROUPS ENGAGED

The court below analyzed respondents' claim by applying its own version of "germaneness analysis," *Southworth*, 151 F.3d at 723, to determine whether the segregated fee was constitutionally permissible. The court used a version of the three-part test set forth in *Lehnert*, 500 U.S. at 519 (finding that to justify the infringement on non-union workers' First Amendment rights in an agency shop, "*chargeable activities* must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." (emphasis added)). The *Southworth* court then found that the use of the segregated fee to support "political" or "ideological" *student groups* independently failed each of the three parts of the *Lehnert* test and therefore violated the dissenting students' First Amendment rights. *See Southworth*, 151 F.3d at 729.

The court radically misinterpreted the *Lehnert* test by applying it to *student groups* as opposed to the *chargeable*

activities in which those student groups engaged.[11] *See Southworth*, 151 F.3d at 725 ("germaneness cannot be read so broadly as to include forced funding of *private political and ideological groups*" (emphasis added)). The Seventh Circuit examined whether *private political and ideological groups* were themselves germane to the university's mission.[12] Under the circuit court's rule, a non-union worker in an agency shop could not be compelled to contribute to the union *at all* if the union ever espoused political or ideological views with which the worker disagreed. This Court has made it clear that this is not the correct result.

The Second Circuit in *Carroll I* cited to the agency shop cases in support of the proposition that dissenting students' mandatory fees must be used for campus-based activities. *See Carroll I*, 957 F.2d at 1002. The court stated: "Students opposed to NYPIRG can be made to tolerate some compromise of their First Amendment rights when the benefits of a varied extracurricular life, hands-on civics training, and robust campus debate are all around them to approvingly take part in, actively oppose, or merely witness dispassionately firsthand." *Id.* (citing *Lehnert*, 500 U.S. at 519-22). The Second Circuit found that the agency shop cases created a limitation on the activities that a student group could engage in—specifically "off campus" activities. Insofar as NYPIRG's activities furthered the university's legitimate educational interests, i.e., were "germane," the infringement on the dissenting students' rights were found to be justified. By contrast, the Seventh Circuit never addressed whether the

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[11] NYPIRG agrees with petitioners' arguments regarding the "germaneness" test.

[12] In a particularly confusing passage, the court below rejected as too "expansive" the Regents' claim that the university's interest in funding the forum was "educational." Instead of trying to narrow down an acceptable formulation of the university's interest, the court merely "reject[ed] the Regents' argument." *Id.* at 725.

activities of the eighteen student groups that were challenged furthered the University of Wisconsin's educational interests.

CONCLUSION

For all of the above reasons and the reasons set forth in petitioners' brief, this Court should reverse the decision of the Seventh Circuit in *Southworth v. Grebe*, 151 F.3d 717 (1998).

Respectfully submitted,

/s/ ALEXANDER R. SUSSMAN
ALEXANDER R. SUSSMAN
Counsel of Record
MICHAEL BIRNEY DE LEEUW
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Including
Professional Corporations)
One New York Plaza
New York, New York 10004-1980
(212) 859-8200

Counsel for Amicus Curiae

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No. 98-1189

IN THE
Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, *et al.*,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JONATHAN P. HIATT
JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. This Court's mandatory fee cases through *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), define, in a wide variety of contexts, the First Amendment interests at stake when the government requires individuals to financially support certain kinds of group activities. While the settings vary from one mandatory fee case to the next, all the cases follow an essentially similar factual pattern. First, individuals who share some common (non-geographical) interest are required by the government to pay a fee used to further a common interest of the fee-paying group. Second, nothing more is required of the individuals than the payment of a fee, although, in order to participate in decisions on how the fee is spent, it may be necessary for an individual to join an organization receiving the fees. Third, at least some portion of the fee eventually goes for expressive activity, as determined by some organization other than the government. And, finally, some fee payers object to paying either the entire fee or that portion of the fee going for expressive activity.

In delineating the right of objecting fee payers to refrain from financially supporting certain activities, the mandatory fee cases through *Glickman, supra,* establish three basic propositions:

> *First*, mandatory financial support of expressive activity is *not* the same as "compelled speech" in that the fee payer is *not* required to personally repeat an objectionable message, to use his or her own property to convey an antagonistic ideological message, or to be otherwise publicly identified with another's message.
>
> *Second*, there is no broad First Amendment right to refrain from financially supporting an organization on the ground that the organization engages in expressive activity.

> *Third*, there is a First Amendment interest in refraining from financially supporting those expressive activities that conflict with one's freedom of belief, and this interest is protected by a right to refrain from financially supporting ideological activities that are not germane to furthering the common interest that justifies the mandatory fee.

2. The approach of this Court's mandatory fee cases through *Glickman, supra,* applies to the particular setting presented by the mandatory student fee at the University of Wisconsin used to finance a limited public forum for expressive activity by a variety of student organizations.

There is no dispositive legal difference between mandatory fees that finance a forum for expressive activities and mandatory fees that otherwise further expressive activities. In both cases, the connection between the fee payer and the expressive activities is purely financial, rather than personal. In both cases, even the financial connection between the fee payers and the expressive activities may be more or less remote depending on the number of organizational levels the fee passes through before ultimately being used for expressive activity. And, in both cases, the content of the expressive activity is not determined by the government.

3. At the same time, the public forum aspect of this case is highly relevant to a correct application of the mandatory fee cases' "germaneness" standard. The government in general, and a public university in particular, has a legitimate interest in providing a forum for the expression of views by individuals and organizations. And, once the government has provided such a forum it is required to make the forum available on a content-neutral basis. Here opening the forum on a content-neutral basis requires that student organizations be allowed to draw upon the fund created by the mandatory student fees with-

out regard to the political or ideological nature of the organizations' expressive activity. That being so the governmental interest in providing a forum for student organization speech and doing so on terms that meet constitutional standards justifies financing the forum through a mandatory student fee.

The court below thus misapplied the "germaneness" standard of this Court's mandatory fee cases in determining that mandatory student fees may not be used to finance groups that engage in political or ideological expressive activity. Such activity is germane to the purpose of creating a forum for the expression of a wide variety of views by student organizations.

ARGUMENT

This case, like the line of mandatory fee cases in this Court through *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), concerns "compelled financial support of group activities," *Lathrop v. Donohue*, 367 U.S. 820 (1961), and objections by one or more of the fee payors to providing such financial support.[2]

In this instance, University of Wisconsin students are required to pay both tuition and a student fee. A portion of the latter is set aside to fund a wide variety of student groups and their activities. This student fee fund provides grants only to registered student organizations. To be registered, a student organization must be a not-

[2] *See Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956); *Lathrop, supra*; *Machinists v. Street*, 367 U.S. 740 (1961); *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

tor-profit, formal group, controlled by students and composed mainly of students. Pet. App. 106a-107a. As one would expect at a university, many of the funded organizations, it appears, engage in expressive activities such as sponsoring speeches and movies and publishing news letters on a wide variety of subjects.

Respondents—university student feepayers—have stated an objection to funding some particular organizations that "engage in political and ideological speech." Pet. App. 20a. Those organizations include some that lobby off-campus on legislative issues of interest to their members, and others that engage in advocacy speech and keep their members informed on specfiic political/legislative issues. Pet. App. 19a-20a (specifying that certain of the named organizations lobby, that others publish a voters guide, that others advise their members how to work against certain legislation, and that others publish documents giving their views concerning the capitalist system, the death penalty, welfare reform, *etc*).[3]

A. This Court's mandatory fee cases through *Glickman, supra*, and this case have the following characteristics in common:

> (1) Individuals who share some (non-geographical) common interest by virtue of their occupation, affiliation, or other objective circumstances are required by the government to pay certain fees;[4]

[3] We do not understand there to be anything in this case, however, touching on direct student organization involvement in partisan political elections.

[4] Where the common interest is geographical and the mandatory fee is collected for and spent by a governmental subdivision—even, it appears, one with limited authority, such as a water district or school board—this Court has indicated that the compelled fee is to be considered a tax. *Keller*, 496 U.S. at 13 (where the "members and officers [of a 'traditional state agenc[y]'] are . . . such

(2) the fees go into a fund later expended in whole or part for expressive activity;

(3) usually, the individuals required to pay the fees also have some role, if they choose to exercise it, in determining how the fees are expended or choosing the officials who make that determination, although doing so may require active involvement in a membership or membership-like organization;

(4) at the same time, the only required connection between the individual and any later expressive activity is the connection between the fee, the fund into which it is initially paid, and the ultimate expenditure; depending on the precise governmental scheme, this money trail may trace a more or a less circuitous route from the fee payment to the organizational expenditure in question, with the result that the financial connection may be more or less attenuated; and

(5) one or more individuals objects to group expenditures on expressive activities traceable to the mandatory fees, and on that basis seeks to avoid payment of the fee in whole or in part.[5]

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because they are citizens and voters," any fees collected are "public funds".) And, as *Keller* makes clear, objecting taxpayers do *not* have any right to object to the use of their taxes for activities with which they disagree. *Id.*

As we explain later, the taxpayer/feepayer distinction regarding the rights of individuals with a conscientious objection to group uses of their funds turns on the nature and the strength of the governmental interest in the one instance and in the other, and not on any difference in the nature of the objecting feepayers' or objecting taxpayers' interest. *See* pp. 15-19, *infra*.

[5] It is worth noting that in this case, the objecting students are objecting *only* to the speech of particular student organizations. They have no objection to "associating" with the University as an institution but instead have voluntarily chosen to do so. And while the students would presumably rather obtain their education free than pay for it, they do not contend, nor could they, any constitutional right to attend the University for free.

The question posed by the prior mandatory fee cases—and by this case as well—is whether the First Amendment protects the objecting feepayers' right to avoid paying for certain ultimate group expenditures, and, if so, for which ones. And, the central propositions of law relevant to answering that question were summarized most recently in *Glickman, supra*, as follows:

First, the Court's "compelled speech case law"—*e.g.*, *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632 (1943); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1 (1986)—is "clearly inapplicable" to the mandatory fee cases as long as:

> The use of assessments . . . does not require respondents to repeat an objectional message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified with another's message. [*Glickman*, 521 U.S. at 470-471 (citations and internal quotation marks omitted).]

It is thus to the point here that the objecting university students are not required to repeat any message out of their own mouths, or to post any message on their homes or property, or to respond to any hostile message. The advocacy to which respondents object is in no way associated with the objectors; rather, the student fees are first collected by the University, then deposited in state accounts, and then distributed to myriad student organizations, which then speak and advocate strictly in their own names. Pet. App. 15a-17a, 101a, 102a, 105a.

Second, there is *no* "broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities." *Glickman*, 521 U.S. at 471.

Third, and finally, there *is* a "First Amendment *interest* in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" "*Glickman*, 521 U.S. at 471 (emphasis added). But that interest does *not* generate an absolute First Amendment protection against making the contribution even where the nature of the expressive activity and the connection between that activity and the objector's compelled fees can be said realistically "to engender [such a] crisis of conscience." As the *Glickman* Court stressed, "our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group." *Id.* at 472. The point of limitation is not at group expressive activity but, as *Glickman* states—drawing on *Keller*, *supra*, and *Abood*, *supra*—at the "expend[iture of] a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified." 521 U.S. at 473.

Thus, where there is a group of individuals so situated that they necessarily have common interests, and there is a legitimate governmental interest in bringing the group together in that regard, requiring group funding of activities "germane to the purpose for which compelled association was justified," *Glickman*, 521 U.S. at 473, does *not* violate the First Amendment.[6] And this is so even

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6 "[I]n an industrial society . . . an association with others is compelled by the facts of life." *Street*, 367 U.S. at 775-76 (Douglas, J., concurring). Thus, lawyers in a state, producers of certain products, employees of the same employer in the same industry, and student in the same university will, in the nature of things, be affected in their common role by common circumstances, whether they commonly fund activities affecting those circumstances or not. Economists call "a number of individuals with a common interest" a "latent group." M. Olson, *The Logic of Collective Action* (1964), at 8, and note that public good considerations may necessitate some degree of compulsion to assure that the affected individuals fairly finance the costs of meeting their collective circumstances. *Id.*, at 76.

where the funded group activities can be characterized as expressive, political or ideological. *Id.*

B. In this case, the dispute between the parties—and between the Seventh Circuit panel and the dissenters in that court from the denial of rehearing *en banc*—centers in doctrinal terms upon whether the foregoing set of legal principles applies where the compelled fee takes the form of a student fee that is devoted to funding on a viewpoint-neutral basis student-controlled organizations that then use the moneys received for a myriad of purposes, including political and ideological advocacy. The panel viewed this case as analogous to the other mandatory fee cases, and applied a standard derived from *Lehnert*, *supra*. The University and the dissenting judges, in contrast, maintain that because the University is required under a separate line of cases culminating in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), to provide access for student groups to a fund derived from mandatory student fees that is distributed to student-run organizations—including religious and political advocacy organizations—on a viewpoint-neutral basis ,the analysis developed in the mandatory fee cases through *Glickman*, *supra*, is entirely irrelevant. On this approach, students can be required to fund through student fees the organizations that have an affirmative First Amendment right of access to use of those government-generated fees under this Court's tripartite forum analysis. *See* Petition for a Writ of Certiorari at 14-15; Pet. App. 3a-4a (Rovner, J., dissenting); 7a-12a (Wood, J., dissenting).

In our view, the Court need not move to a new paradigm to decide this case. Rather, applying the established mandatory fee analysis outlined above—with the flexibility and sensitivity to the particular purposes and structural details of various mandatory fee schemes we believe the Court's jurisprudence contemplates—yields the same result as the *Rosenberger*/tripartite forum analysis put forward by the University and the *en banc* dissenters.

As the above summary indicates, the First Amendment right to opt out of paying mandatory fees for political and ideological activities is a narrow one, triggered only when those activities are not "germane" to the "purpose for which compelled association was justified." *Glickman*, 521 U.S. at 473. Where—as here—that purpose necessarily includes—by constitutional fiat—providing various subgroups of the large "latent group" equal access rights to speech-enhancing facilities, political and ideological advocacy by such self-defined subgroups through use of those facilities is necessarily "germane" to the collective endeavor. In that circumstance, the line of cases culminating in *Glickman*, *supra*, permit such expenditures from funds created through the collection of mandatory fees.[7]

[7] We note that the panel below applied an analysis derived from *Lehnert*, *supra*, rather than from *Glickman*. But *Glickman* is both later and more compresensive. The *Lehnert* analysis is particularly adapted to the scheme of our labor relations statutes, and does not easily translate to other circumstances. And, while the portion of the *Lehnert* opinion stating the standard relied upon by the panel decision below was for five members of the Court, one member of that majority, Justice Marshall, went on in a separate opinion to indicate that his concurrence in that portion of *Lehnert* was partial. 500 U.S. at 534 (Opinion of Marshall, J.) (dissenting from the portion of the plurality opinion most relevant here regarding whether lobbying expenses are broadly chargeable to objecting feepayers, and joining in Part II of the plurality opinion only "otherwise"—*viz.*, only to the extent that it is consistent with Justice Marshall's own analysis of the lobbying expenditures.); *id.* (describing the *Lehnert* plurality's three-part standard in the negative rather than affirmative, indicating an understanding that all three mentioned conditions need *not* obtain before lobbying expenditures are chargeable.) Given both considerations we believe that it is *Glickman* that provides the most authoritative statement of the applicable principles, albeit in general terms, and we proceed accordingly in briefing the instant case.

In other words, the "forum" aspect of this case is fairly seen as a factor relevant in applying the mode of analysis already developed by this Court in the line of mandatory fee cases culminating in *Glickman* rather than a consideration calling for a new mode of analysis. And, applying that analysis here yields the conclusion that mandatory fees may be used to provide a "forum" for speech, equally accessible by members of the group paying the fee, without creating in any realistic sense any "conflict with [any fe payor's] 'freedom of belief,'" *Glickman*, 521 U.S. at 473, as we now show.

B. Petitioners' departure point in arging for a separate approach to mandatory fee cases in which the fees support speech activity on a viewpoint-neutral basis is the contention that such subsidization cannot be distinguished from the provision of physical facilities for speech activities often required by the public forum doctrine. Petitioners draw upon this Court's precedents holding that those facilities must also be made available on a viewpoint-neutral basis if broadly available for expressive purposes at all. *See generally, e.g., Healy v. James*, 408 U.S. 169 (1972); *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981) (all facilities-access cases). And, petitioners' ultimate point is that applying a mandatory fee analysis to forum-creation cases would yield absurd results, for each student paying tuition could equally well

claim a crisis of conscience in being required to support, in part, the university's physical facilities.

It is quite true that a university program for distributing funds to student-run organizations on a viewpoint-neutral basis because required to do so by the First Amendment's affirmative protection of speech in a limited public forum is no more nor less a subsidy of private speech than a program providing free access to buildings or outdoor spaces for the same reason. In both instances, student tuition or student fees are aiding in some limited way the communication of messages from organizations of students to other students and, on occasion, to legislators and to the general public.[8] And, in both instances,

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[8] We can conceive of no basis for distinguishing between tuition payments and mandatory student fees (such as the instant "segregated fee," Pet. App. 101a), for the purpose of determining the opt-out rights of students who object to expenditures made with those payments of fees. The segregated fee is required as a condition of attending the University and, once collected, is deposited in state accounts. Pet. App. 100a. And while a committee of the Associated Students of Madison, the University of Wisconsin student government, has a role in allocating those portions of the aggregated segregated fees that are distributed to student organizations, the Chancellor and the Board of Regents must approve all such grants. Pet. App. 109a-110a.

This symmetry between ordinary tuition payments and the segregated fee suggests that if objecting students must be permitted to refuse to pay a portion of the segregated fee because grants are made for political and ideological advocacy to which the students object, then a similar right to opt out of a portion of tuition payments where those payments support political and ideological speech to which a student objects on conscientious grounds must be provided as well. Expenditures made from ordinary tuition payments could, for example, include expenditures for lecture series by political figures advocating on political issues, as well as funds for experiential education, including work-study participation in advocacy organizations. Just as the "International Socialist Organization . . . advocated the overthrow of the government" by arguing for "Revolution Not Reform [; r]eforms within

neither the university nor any general organization of students is communicating any political or ideological message; all the speech that occurs is in the name of, and is easily identified by listeners with, an organization made up only of voluntary members. In sum, given the neutrality of the fund distribution process here, Pet. App. 106a, and the parallel neutrality required by the First Amendment where facility usage is at issue, *see Widmar, supra* and *Healy, supra*, in both instances the connection between the objecting feepayers and the speech to which they object is so attenuated as to raise no realistic "crisis of conscience." *Glickman*, 521 U.S. at 472.

At the same time, it can also be said that in three different respects—each highly relevant to analyzing objecting feepayer First Amendment claims—such forum-creating mandatory fees, whether the forum created is physical or financial, are very much of a piece with other mandatory fees:

First, it is generally true that the connection between the feepayers and the objected-to expression in the mandatory fee cases (as opposed to the compelled speech cases) is *only* one of money. In the union fee cases, for example, that connection is quite attenuated, albeit perhaps one step less attenuated than here. The feepayers are not required to be members of any organization, and the members of the organization whose political and ideological speech is at issue do not purport to speak for the objecting fee payer but only for the membership. *See generally Labor Board v. General Motors*, 373 U.S. 734, 742-43 (1963).

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the capitalist system cannot put an end to oppression and exploitation," Pet. App. 19a, so a professor in the classroom or a speaker in the university auditorium might similarly argue, or might argue instead for imprisoning those who advocate revolution.

Where the *only* connection between an individual and organizational speech is financial, there is no basis for third parties to attribute the organization's views to the objecting feepayer. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 87 (1980)) (no realistic fear that the views of protesters in a private shopping mall would be attributed to the mall owner); *Rosenberger*, 515 U.S. at 841-42 (no realistic fear that the religious views of a student publication would be attributed to the University where the publication speaks in its own name, albeit with the use of University-provided services).

Such a purely financial connection, indeed, is little different from the one created where a consumer buys a service or product at a fixed price from a company which then uses a portion of its profit to lobby or make political contributions.

Second, the money-trail connection between the objecting feepayer and the speaker in the mandatory fee cases can vary in length and complexity depending on particular circumstances and *not* on whether the case involves a mandatory student fee. In the union context, once again, the mandatory fee may go to a local union which itself engages in no political or ideological activity but which is required, as a condition of affiliation with a national organization which does engage in such activity, to pay over a portion of the mandatory fee to the national as "per capita tax." *Cf. Lehnert*, 500 U.S. at 523-34. On the other hand, a university could well deposit student fees, or some portion thereof, directly in a student government account rather than, as here, in a state account. We doubt that the appropriate mode of analysis —as opposed to the result obtained in applying that analysis—should turn on the number of layers of decision-makers or fee depositories between the objecting feepayer and the speech to which he or she objects.

Third, while it is true that a union or a bar association ordinarily spends its moneys to forward its own views rather than, as here, distributing funds on a viewpoint-neutral basis, it is also true that the *government* is not prescribing the union's or the association's message or allocating money to the organization on any viewpoint basis. Given that the First Amendment's proscriptions run against the government, *not* against private entities—and that the original "freedom of belief" cases on which *Abood, supra*, and its progeny are based were concerned with *government*-prescribed orthodoxy—the compelled fee cases through *Glickman, supra*, and this mandatory student fee case cannot easily be said to be different in kind.

The sum of the foregoing is this: In the mandatory fee cases through *Glickman, supra*—as well as in this forum case and its physical forum analog—the individual feepayers' claim of a governmental-imposed "crisis of conscience" or infringement of "freedom of belief" is in its essence the same claim of the same character and the same strength. And, in the mandatory fee cases through *Glickman*, this Court, while recognizing that such objecting feepayers claims may sometimes have constitutional validity, has found such claims wanting where the group political or ideological expenditures are germane to the purpose for which the government has mandated that similarly-situated persons finance projects that necessarily affect the group. *Glickman*, 521 U.S. at 473. We submit that this "germaneness" analysis leads to the conclusion that the objecting student feepayers' claim here is wanting as well.

C. In considering how the "germaneness" standard operates in the present forum-creation situation, we begin with an analogy to the most basic forum-creation situation—the creation of a traditional public forum by a state or local government.

Under this Court's tripartite forum analysis, streets and parks generally open to the public must be available for expressive use, including political and ideological advocacy, by organizations and individuals. *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939) (public parks must be available for advocacy speech by labor organization); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992) (public streets must be available for parade by racist organization, despite the substantial costs incurred by the taxpayers as a result.) While in some instances there may be no added cost to the public fisc from such usage, in many instances there is an added cost, for police protection, clean-up, maintenance, and for other event-specific expenditures. *Forsyth County*, 505 U.S. at 134-35. And, that cost may not be recoupable from the speaker or advocacy group. *Id.* at 136. The net result is that a portion of the taxes paid by taxpayers may be used to subsidize speech by private groups they abhor.[9]

This Court, as we have noted, has made it clear that as a general matter taxpayers have *no* constitutional right to a refund of that portion of their taxes used to finance speech (or other activities) with which they disagree:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no

[9] This same result comes about too where the government affirmatively subsidizes the speech of private groups not to enhance the government's own voice but to promote a multiplicity of voices. *See, e.g., National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

> one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it would be radically transformed. Cf. *United States v. Lee*, 455 U.S. 252, 260 (1982). [*Keller*, 496 U.S. at 12-13.]

While this analysis assumes that the government is using the taxes to speak on its own behalf, the Court's cases take the same approach where the government collects taxes and then distributes a portion of the taxes to promote a multiplicity of voices or facilitate the speech of private individuals. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 385 n.16 (1984); *Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976).[10]

The reason why taxpayers may not reduce their tax payments if they object to the use of their tax moneys to advance views with which they disagree is *not*, it bears emphasis, that there is any distinction from the *objecting individual's point of view* between being required to pay through a tax system for political and ideological activities with which he or she disagrees and being required to pay for such activities through a mandatory fee system not applicable to the citizenry at large.

Whether the individual is paying taxes to a small city or tuition and student fees to the University of Wisconsin (which is larger than many small cities and charges tui-

[10] For example, we assume that when the Court held last term that the National Endowment for the Arts has broad authority to make content-based decisions in using government funds to finance private art projects, *National Endowment for the Arts v. Finley, supra*, it was not reserving *sub silentio* the possibility that individual taxpayers could obtain a refund if they found one or more of the projects funded was inconsistent in its viewpoint with their own political beliefs.

tion and fees higher than many individuals' tax bill), he or she may have precisely the same objection to the use of the money to finance political or ideological speech with which he or she disagrees. And, the connection between the money and the speech is basically the same as well: The individual pays money under compulsion into a general fund and some of that money that finds its way into the hands of a person or organization that makes expenditures on political or ideological expression.

The basis for the conclusion that individuals cannot opt out of paying taxes for "freedom of belief" reasons must inhere, instead, in the other side of the "germaneness" equation: Given the relatively weak nature of any First Amendment interest in withholding otherwise valid financial exactions on the basis of conscientious objection to the eventual use of the money, the interest in providing democratic and effective governance for the individuals who live in the area covered by the particular governmental unit overrides any individual's right to abstain.[11]

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11 We note that the "germaneness" standard may, however, still state a valid limitation in the tax situation, at least in theory: A taxpayer may have reason to object if a governmental subdivision spends funds on political and ideological issues that are beyond that subdivision's area of substantive and geographical concern.

We realize that this Court has never recognized a right in individual taxpayers to a rebate of a portion of their taxes on "freedom of belief" grounds. We realize too that there may never be any occasion to address the question, because the scope of expenditures by governmental bodies is ordinarily controlled by statute so that expenditures on matters not germane to the body's substan tive and gographical authority are likely to be *ultra vires*. And we realize, as well, that private political and ideological organizations, in contrast, are usually free to spend their funds as they see fit, and indeed governmental interference could constitute an affirmative interference with freedom of speech.

But we believe that our basic point holds—under the governing law as we understand it, individuals can be compelled to contribute toward political or ideological expression with which they may

All of the foregoing is true here as well. A student fee fund to finance grants to student organizations—and student organization expressive activity—on the basis of neutral eligibility criteria—and viewpoint neutrality—furthers an important governmental purpose derived from the First Amendment as interpreted in *Healy, supra, Widmar, supra* and *Rosenberger, supra*—a purpose that is parallel, as noted above, to the maintenance through taxation of traditional public fora.

"The quality and creative power of student intellectual life . . . [is] a vital measure of a school's influence and attainment." *Rosenberger*, 515 U.S. at 836. It is thus, sound and proper for a public university to foster "thought and experiment," *id.* at 835, among its students by "expend[ing] funds to encourage a diversity of views from private speakers," *id.* at 834. At the same time, the public university "may not discriminate based on the viewpoint of private speakers whose speech it facilitates." *Id.* at 834.

This nondiscrimination rule addresses a "danger . . . to speech from the chilling of individual thought and expression," which the *Rosenberger* Court perceived to be "especially real in the University setting." *Id.* at 835. Sensitive to that "danger," the University of Wisconsin set neutral criteria for determining which student organizations would be eligible to draw upon its mandatory student fees fund. In this regard, the University wisely chose not to navigate the "distinction between, on the one hand, content discrimination, which may be permissible, if it preserves the purposes of that limited forum, and, on the other hand, view point discrimination, which

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disagree only to the extent that the entity receiving and distributing the funds does not go beyond "the cause that justified bringing the group together." *Abood*, 431 U.S. at 222-22, *quoting Street*, 367 U.S. at 778 (Douglas, J., concurring).)

is presume impermissible when directed against speech otherwise within the forum's limitations," *id.* at 829-830, and to eschew any exclusion of a student organization from funding based on its political or ideological activity —an exclusion that inevitably would be taken as "cast-[ing] disapproval on particular viewpoints of [those] students," thereby "risk[ing] the suppression of free speech and creative inquiry," *id.* at 836.

There can be no doubt, then, that it is proper for a public university to provide for a student organization expressive activities program as a whole. And, where such a program is open to student organizations generally and provides a benefit to the student community as a whole, it is equally plain that it is proper to finance the program through a mandatory student fee. The mandatory fee cases through *Glickman* stand for the proposition that, where those conditions of universality are met, requiring each member of the benefitted group to pay his/her share of the cost is justified by the "cause that . . . bring[s] the group together." *Abood*, 431 U.S. at 222-223. And, as *Rosenberger* makes clear, the financing of student organization political and ideological speech is germane to such a program as a whole in the most basic sense—providing financing on an equal basis is essential to the program's constitutional validity.

For these reasons, treating political and ideological speech as generating an opt-out right for students who disagree with this or that student organization's viewpoint is radically inconsistent with the proper effectuation of the student organization activities program as a whole—and with its constitutional validity. A public university may not limit a student organization's use of a physical public forum, such as an auditorium or lecture hall, in proportion to the student objections to providing indirect financial support to the propagation of the organization's po-

litical or ideological views. By the same token, a public university may not limit in such a proportion a student organization's access to student organization activities funds that would be available on the fund's neutral criteria on the basis of student objections to the organization's political or ideological expression. Yet that is precisely what the objecting students here demand.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

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THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *ET AL.*,

Petitioners,

against

SCOTT HAROLD SOUTHWORTH, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ELIOT SPITZER
Attorney General of the State of New York
Counsel for Amici States
The Capitol
Albany, NY 12224
(518) 402-2028

Dated: June 14, 1999

PREETA D. BANSAL
Solicitor General and Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

LAURA ETLINGER
Assistant Attorney General

Of Counsel

(Additional counsel listed on inside cover)

24pp

MARK PRYOR
Attorney General of Arkansas
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, AK 72201
(501) 682-2007

KEN SALAZAR
Attorney General of Colorado
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
(303) 866-4500

THURBERT E. BAKER
Attorney General of Georgia
Office of the Attorney General
40 Capitol Square, SW
Atlanta, GA 30334-1300
(404) 656-3300

THOMAS R. KELLER
Acting Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1237

THOMAS J. MILLER
Attorney General of Iowa
Hoover Building
Des Moines, IA 50319
(515) 281-3349

RICHARD P. LEYOUB
Attorney General
State of Louisiana
Department of Justice
Civil Division
One American Place
301 Main Street, Suite 600
P.O. Box 94005
Baton Rouge, LA 70804-9095
(504) 342-7013

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6955

THOMAS F. REILLY
Attorney General of Massachusetts
The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, MA 02108-1698
(617) 727-2200

MIKE HATCH
Attorney General
State of Minnesota
102 State Capitol
St. Paul, MN 55155
(651) 296-6196

JOSEPH P. MAZUREK
Attorney General
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

MICHAEL F. EASLEY
Attorney General of North Carolina
P.O. 629
Raleigh, NC 27602
(919) 716-6400

BETTY D. MONTGOMERY
Attorney General
State of Ohio
State Office Tower
30 East Broad Street
Columbus, OH 43215-3428
(614) 466-4638

PAUL G. SUMMERS
Attorney General and Reporter
State of Tennessee
426 Fifth Avenue North
Nashville, TN 57245-0485
(615) 741-6941

MARK B. ROTENBERG
General Counsel
Regents of the University of Minnesota
325 Morrill Hall
100 Church Street S.E.
Minneapolis, MN 55455
(612) 624-4100

(Names of Counsel Continued)

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No. 98-1189

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BRIEF OF THE STATES OF NEW YORK, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37, the States of New York, Arkansas, Colorado, Georgia, Hawaii, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina,

Ohio and Tennessee and the Regents of the University of Minnesota, respectfully submit this brief as *amici curiae* in support of petitioner. Consent to the participation of the Regents of the University of Minnesota as *amicus curiae* was given by all parties. Copies of the consent letters have been filed with the Court.

STATEMENT OF *AMICI CURIAE* INTEREST

The States have a strong interest in permitting public universities to maintain programs which fund -- through the use of a mandatory student fee -- various student and community organizations, some of which engage in ideological and political speech. These programs further educational goals by fostering "a marketplace of ideas" on the university campus that encourages students to express themselves on academic, social and political issues, and creates opportunities for debate and open discussion by exposing students to a variety of viewpoints. "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (citation omitted). Indeed, as this Court has stated, "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation omitted).

To promote their educational goals, most public universities have a well-developed student organization and activity program funded by a mandatory student fee. Extra-curricular student organizations and activities became an important element of the American university student's experience in the 1800's. *See* David Meabon *et al.*, *Financing Campus Activities* 59 (1996).

The proliferation and importance of student activities continues to grow. The popularity of the mandatory activity fee to fund student organizations and activities, and the breadth of the activities and organizations which are funded by it, have been documented by educational studies. *See id.* at 41-42, 44; *see also* 1 James A. Rapp, *Education Law* § 5.04(4)(a) (1999). The results of a national student activity fee survey conducted four times during a fifteen-year period demonstrates that the use of a mandatory fee has been, and remains, the funding method used to finance student activities by a large majority of universities and colleges. *See* Meabon *et al.*, *supra*, at 44 (the mandatory fee funding method was used by approximately 70% of the universities surveyed during each survey period).

Organizations and activities funded by the activity fee include student government, entertainment programs, cultural clubs, academic clubs, intramural and intercollegiate athletics, professional groups, honor societies, fraternities and sororities, student newspapers, student counseling centers, and civic/political groups. *Id.* at 41. New York, for example, permits, but does not require, a mandatory student fee program at the campuses in its State university system. The students at each State campus decide by referendum at least every four years whether student activity programs will be supported by a voluntary or mandatory fee. *See* N.Y. Comp. Codes R. & Regs., tit. 8, § 302.14(a) (1995). If elected, the mandatory fee is used to support a broad range of student organizations, as well as a variety of student activities, including recreational and social activities, tutorial programs, athletic programs, student publications, supplemental student services, and remuneration to student government officers. *See id.* § 302.14(c)(3).

However, the range of permissible activities funded by student activity fees is not unlimited. Parameters for the appropriate use of these fees are commonly established by state legislatures or

governing bodies of public university systems. In New York, for example, the fees at campuses in the State university system may only be used to support recognized student organizations whose purposes and activities are "of educational, cultural, recreational or social nature." N.Y. Comp. Codes R. & Regs, tit. 8, § 302.14(c)(3)(vi) (1995). Likewise, as set forth in the parties' stipulated facts in this case, the registered student groups that receive funding from the University of Wisconsin's mandatory activity fee must engage in activities that are related to student life on campus. *See also Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 824 (1995) (University of Virginia mandatory student activity fee was intended "to support a broad range of extracurricular student activities that are related to the educational purpose of the University" (internal quotation and citation omitted)); Or. Rev. Stat. § 351.070(3)(d) (1997) (programs financed by student fees must be "advantageous to the cultural or physical development of students"). Other university systems choose to prescribe more specific limitations on the use of student activity fees. *See* Meabon *et al.*, *supra*, at 56 (indicating that some universities prohibit the use of student activity fees for political contributions and partisan political activities).

Reliance on a mandatory student fee to fund extra-curricular activities serves a number of purposes. It provides stability for student organizations which can rely upon the fee to maintain their core activities from year to year. It further creates an opportunity for the members of the student government to administer the disbursement of these funds, a useful civic and real-world experience.

There is a direct educational benefit to State universities' choice to maintain the activity fee as a distinct charge separate from tuition and other mandatory university fees. This funding method emphasizes to the students that they are responsible for

the activity fund -- both for its funding and, through their student representative body, for its allocation and distribution. The fee thus becomes more directly accessible to students, encouraging diverse student participation. Because all students are assessed the fee, they are encouraged to maximize its personal value to themselves by joining, or forming, a group which matches their academic or extra-curricular interests. In this way the mandatory separate activity fee helps ensure that extra-curricular activities form an important part of students' educational experiences.

SUMMARY OF ARGUMENT

When a public university uses mandatory student activity fees to create a fund for financing channels of communication for student organizations, the university creates a limited public forum. As this Court stated in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995), traditional public forum analysis governs use of these funds. The university may limit use of the funds to particular topics or content of speech based on its educational objectives, but it may not discriminate among speakers on the basis of their viewpoint with respect to permitted topics.

Consistent with these principles, a university may choose to limit availability of designated extra-curricular funds to student groups that are not engaged in ideological or political speech or based on other criteria, but there is no constitutional imperative that it so limit use of its forum. As a matter of educational policy, university officials may choose to make the university's extra-curricular fund available to a broad range of organizations, some of which engage in political or ideological speech.

The forum created by a mandatory student activity fee is indistinguishable, for First Amendment purposes, from other

types of mandatory fees which support traditional physical public fora like public parks and places used for public speaking. It is undeniable that a fee-paying member of the public cannot object to payment of the fee on the ground that the fee is used in part to provide a forum for political speakers with whose message the fee-payor disagrees. As long as access to the extra-curricular fund, like a public park, is available to speakers on a viewpoint-neutral basis, no First Amendment burden is imposed by the university's use of a mandatory student activity fee to create a forum for diverse speech.

The Court of Appeals in this case erred by focusing exclusively on the *Abood/Keller* line of cases. Those cases are distinguishable because they involved compelled association with a particular group. The mandatory fees were used to underwrite a single, collective speaker with which employees in *Abood* and bar members in *Keller* were forced to associate. The Court was concerned with limiting the burden already imposed on the First Amendment associational rights of those dissenting members and so required that funded ideological speech of the association be limited to speech germane to the State interest which justified the forced association.

In sharp contrast, the challenged mandatory student activity fee funds a public forum for a wide spectrum of speakers and viewpoints. The student activity fee does not fund a single speaker or single ideological viewpoint. The analysis applied by this Court in the union fee and integrated bar association cases accordingly has only limited application to the mandatory fee at issue here. Even if applicable, the "germaneness" principles of *Abood* and *Keller* were incorrectly applied by the Court of Appeals.

Finally, the decision below undermines fundamental First Amendment principles. While student activity fees are not part

of a general tax designed to raise revenue for the university, the fees nonetheless constitute "public funds" in the same manner as do tuition payments. The ability of students to withhold or seek refund of tuition payments because they are used to finance certain teachers who disseminate political or ideological messages, however, would be wholly antithetical to the important First Amendment interests served by the strong tradition of academic freedom. It is of no constitutional significance that most public universities choose, as a matter of educational and administrative policy, to charge a mandatory student activity fee that is separate and apart from other required payments such as tuition.

The decision below should be reversed.

ARGUMENT

I.

BECAUSE THE MANDATORY STUDENT ACTIVITY FEE IS USED TO CREATE A VIEWPOINT-NEUTRAL FORUM, IT DOES NOT BURDEN THE FIRST AMENDMENT RIGHTS OF STUDENTS WHO DISAGREE WITH SOME OF THE VIEWPOINTS WITHIN THE FORUM.

The use of a mandatory student activity fee at public universities furthers important state educational interests by creating a public forum for student speech and activities on a variety of topics and from a multitude of viewpoints. *See Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. at 830, 840 (the "student activity fee [is] designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student

expression is an integral part of the University's educational mission"); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

When a university uses the student activity fee to create channels of communication for student organizations, it creates a limited public forum open for the expressive activities of student organizations. *See Widmar*, 454 U.S. at 267-68 (university's policy of generally opening its facilities to student groups created a limited public forum); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985) ("a public forum may be created by government designation of a * * * channel of communication for use by * * * certain speakers"). The fact that the student activity fund is not a physical facility does not prevent its designation and use as a forum. *See Rosenberger*, 515 U.S. at 830 (recognizing that forum analysis applies to student activity fund even though it is not a forum in a "spatial or geographic sense"); *Cornelius*, 473 U.S. at 801-06 (applying forum analysis to a federal employee charitable contribution system); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49 (1983) (applying forum analysis to school's internal mail system).

The government may legitimately confine a limited public forum to the use to which it is dedicated. *See Rosenberger*, 515 U.S. at 829; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993); *Cornelius*, 473 U.S. at 806. Content-based discrimination of speech is thus permissible if it preserves the purposes of the limited public forum. "Once it has opened a limited public forum, however, the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. That is, the government may reserve the property for certain groups or for the discussion of certain topics, but these limitations must be "'reasonable in light of the purpose served by the forum and * * * viewpoint neutral.'" *Lamb's Chapel*, 508 U.S. at 392-93 (quoting *Cornelius*, 473 U.S. at 806).

Viewpoint-based discrimination against speech on a topic that is permitted within the forum is presumptively unconstitutional. *See Rosenberger*, 515 U.S. at 829-30.

Consistent with these principles, a public university may dedicate the student activity fee for student speech and may require that groups meet other objective criteria in order to receive funding (i.e., that the organization be composed primarily of students, have a faculty advisor, etc.). A public university may also choose, as a matter of educational policy, to limit the forum to student groups that are not engaged in political or ideological speech or activities. There is, however, no constitutional imperative that a public university make such an educational policy determination regarding the use of its limited public forum.

The decision below, by limiting the permissible content of funded speech in a limited public forum, intrudes unnecessarily upon the educational judgments of public university officials. Here, Wisconsin has chosen to limit the activities funded with the mandatory fee to those that benefit students or campus, a workable limitation which serves to preserve the nature and purpose of the forum. The university's determination as to the types of student activities that best serve its educational goals should not be subject to judicial second-guessing. So long as the student activity fee is not allocated on the basis of viewpoint of the organizations' speech, state university officials' determinations as to the appropriate content cannot be disturbed.

Like the traditional public forum, the student activity fee provides an opportunity for diverse private speakers "who convey their own messages." *Rosenberger*, 515 U.S. at 835. Indeed, the mandatory student activity fee is indistinguishable, for First Amendment purposes, from other types of mandatory fees which support traditional public fora like our public parks

and other places used for public speaking. Park fees, for example, like the activity fee here, finance a public forum. (While the park fees create a physical forum for speech, the activity fees create a monetary forum for speech.) In the context of a public fee-supported physical forum it could not seriously be argued that a fee-paying member of the public could object to payment of the fee on the ground that the fee is used in part to provide a forum for political speakers with whose message the fee-payor disagrees.

As members of the public we support the erection and maintenance of countless public fora. Because access to a public forum is available on a viewpoint-neutral basis, the forum may at times be used by speakers with whom we disagree. But, whether the forum is supported by general appropriations or a specific user fee, this is the price we pay for living in a society which makes available such public fora for speech. And it is also understood that no Free Speech burden is imposed upon those who financially support the forum when the forum is used for speech to which they are opposed. But this is essentially the position taken by the objecting students in this lawsuit and accepted by the courts below. Viewed as an objection to the use of a viewpoint-neutral public forum, their position is flawed.

II.

THE COURT OF APPEALS ERRED IN ITS RELIANCE ON THE *ABOOD/KELLER* LINE OF CASES

A. *Abood/Keller* Provide A Flawed Legal Framework For This Case

The Court of Appeals for the Seventh Circuit erred by focusing exclusively on the *Abood/Keller* line of cases. *See Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit*

Bd. of Educ., 431 U.S. 209 (1977).[1] The *Abood/Keller* cases all involved an underlying compelled association with a single group. In *Abood*, 431 U.S. at 235, the Court was concerned with the constitutionality of the agency shop in which one union is the exclusive bargaining agent for union and nonunion employees alike and the nonunion employees are required to pay a service fee equivalent to the union dues. Only secondarily was the Court concerned with the union's uses of the mandatory service fees once collected from nonmembers. Id., at 232. In *Keller*, 496 U.S. 1, lawyers in an integrated state bar were compelled to pay membership dues to the state bar association as a condition of practicing law in that state. *See also Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457 (1997) (involving objection to collective advertising in regulated agricultural market).

In each of these cases, the Court recognized that the situations involved a compelled affiliation with the private organization which imposed a burden on individuals' First Amendment associational rights, without regard to the specific activities that

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[1] While many courts have looked to this line of cases for guidance in determining the constitutional validity of a mandatory student activity fee program, the courts have differed in their application of these cases and in the results reached thereunder. *See, e.g., Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1038-40 (9th Cir. 1999) (upholding funding of educational arm of Public Interest Research Group as germane to purpose for which mandatory fee is required); *Carroll v. Blinken*, 957 F.2d 991, 996-1003 (2d Cir.) (relying on *Abood/Keller/Lehnert* to hold that mandatory student funding of political activities constitutes compelled speech, but applying and sustaining funding program under intermediate scrutiny test rather than germaneness test), *cert. denied*, 506 U.S. 906 (1992); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983) (distinguishing *Abood* and finding that funding of student newspaper by mandatory student fee is germane to university's educational duties); *Smith v Regents of Univ. of Cal.*, 844 P.2d 500, 511-12 (Cal. 1993) (in bank) (invalidating mandatory student fee program under germaneness test by focusing on educational mission of the funded organizations).

were funded with the mandatory fees. As the Court noted in *Abood*:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. * * * To be required to help finance the union as a collective-bargaining agent might well be thought * * * to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.

431 U.S. at 222, 225; *accord Glickman*, 521 U.S. at 469 (recognizing that collective action in regulated market limits business entities "freedom to act independently"); *Lehnert v Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991); *Ellis v. Brotherhood of Ry., Airline, and Steamship Clerks*, 466 U.S. 435, 455 (1984) (the agency shop involves "a significant impingement on First Amendment rights"); *Keller*, 496 U.S. at 13-14 (describing context as involving "compelled association").

Because the mandatory fees in the *Abood/Keller* line of cases were part of a compelled association with a single group, the Court used a germaneness inquiry to determine the constitutionality of the use of the fee to fund political speech. The compelled association with the union or bar association already burdened the First Amendment rights of employees and bar members who objected to the organization's viewpoint or activities, but this impingement was permitted by the Court because it was supported by sufficiently significant government interests -- in *Abood*, promoting labor peace and avoiding a free rider problem in the union context, and in *Keller*, regulating the professional bar. Given that a significant First Amendment burden was already imposed on dissenting members, the Court required that activities funded with the fees of dissenting

members be germane to the State interests that justified the compelled association.[2]

In the mandatory student activity fee context, however, there is no underlying compelled affiliation between the public university students and the myriad organizations which receive funding. The students choose to attend the public university and thereby agree to abide by all of the university's financial requirements, including the mandatory activity fee. As a condition of their attendance at the public university the students are compelled to pay the activity fee, but the fee is not a corollary to an existing compelled affiliation as in the agency shop and integrated state bar.

The union fee and integrated bar association cases are inapplicable to the student activity fee challenged here for another compelling reason. Employees in an agency shop and the members of an integrated bar are forced to fund a single speaker with specific ideological interests, which the organization's funding choices presumably reflected. Thus, the mandatory fees in *Abood* and *Keller* were not viewpoint neutral.

In sharp contrast, the mandatory student activity fee is specifically earmarked for a *viewpoint-neutral* purpose, to fund a diverse forum of student speech. It does not aid only a single organization with which the students are identified. The burden

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[2] In *Lehnert*, the Court further refined the germaneness test, explaining that it consists of a three-step inquiry, which, in addition to the germaneness inquiry, focuses on the relationship between the government interests that justify the compelled affiliation and the additional burden that the challenged activities add to that compulsion. The tripartite germaneness test asks whether the objectionable activities (1) are germane to the activities upon which the compelled association is premised, (2) are justified by the government's vital policy interests which underlie the compelled affiliation and dues and (3) do not significantly add to the burdening of free speech already inherent in the compelled association. 500 U.S. at 519.

placed upon the objectors in the agency shop and integrated bar settings -- a compulsion to fund a specific ideology with which they disagreed -- is absent from the university activity fee setting.

Indeed, because a student activity fee creates a forum for speech which includes many speakers who express a variety of, and even conflicting, viewpoints, there is little danger that any one of these various voices will be attributed to the student body as a whole, or any individual member of it. *See Rosenberger*, 515 U.S. at 835 (mandatory student fee creates a forum for private speakers "who convey their own messages"). For the same reasons that the speech of the funded groups is not attributable to the university, *see id.*, at 834, 841, it is not attributable to the students at large: "The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis * * *, significantly diminishes the danger that the message of any one [group] is perceived as endorsed" by the student body as a whole. *Id.* at 850 (O'Connor, J., concurring); *Widmar*, 454 U.S. at 271 n.10 ("But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there."). Just as the government does not endorse any of the religious entities which receive funds from a general funding scheme, so the students who fund a forum for diverse speech do not endorse any of the particular views expressed in the forum.[3]

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[3] The mandatory student fee is thus similar to the general funding measures which survive scrutiny under the Establishment Clause. Because the funding in those cases reaches not only religious activities, but many other activities as well, the speech of the funding recipient is not attributable to the funding source. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding as part of a general program of state aid to disabled students the funding of a sign language interpreter used by a student at a private religious school); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding as part of a general program of vocational aid to disabled persons the provision of funding to a blind person engaged in religious study at a private religious college); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state income tax deduction for educational expenses which applied to expenses incurred at both public and private schools); *see also Rosenberger*, 515 U.S. 819 (holding that Establishment Clause was not offended by use of public university's generally applicable mandatory student activity fee to provide financial assistance to a religious newspaper); *Widmar*, 454 U.S. at 274 & n.14 (because university makes its property available to wide range of student groups, it "does not confer any imprimatur of state approval on religious sects or practices" if the property is used by a student group for religious purposes).

In sum, the mandatory student fee is in a different category from the mandatory union fees and bar association dues which are used to fund a single speaker with whom the objectors must associate. Because the student fee is used to finance the activities of a multitude of groups with diverse and divergent ideologies and viewpoints, its constitutionality should not be measured by the germaneness test which was developed for application to speech not within the context of a public forum.[4]

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[4] In *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the Court was presented with the question whether a public university could refuse to fund an otherwise eligible student activity because it promoted a religious viewpoint. In discussing whether the Establishment Clause justified this university regulation, the majority, citing to *Abood* and *Keller*, recognized that the issue presented here -- whether students may object on First Amendment grounds to the use of the activity fee to fund speech with which they disagree -- was not before the Court and was not decided by it. *Rosenberger*, 515 U.S. at 840. Additionally, Justice O'Connor, also citing to *Abood* and *Keller* in her concurring opinion, recognized that the ability of objecting students to opt out of funding certain groups might distinguish the mandatory activity fee, for Establishment Clause purposes, from other government programs that fund religious activities. *Rosenberger*, 515 U.S. at 851-52 (O'Connor, J., concurring). However, because the First Amendment claim of objecting students was not before the Court in *Rosenberger*, the applicability of the *Abood/Keller* line of cases to the activity fee remains an open question.

B. The Court of Appeals Erred In Its Application of the Germaneness Test

Even if applicable, the Seventh Circuit's application of *Abood* and *Keller* to the activity fee was flawed. First, the Court of Appeals erred in rejecting the University's claim that a broad governmental purpose -- educating students by providing opportunities for and exposure to diverse expression -- encompassed the challenged political and ideological speech of the funded organizations. *See Southworth*, 151 F.3d 717, 724-25 (7th Cir. 1998). Although a similarly broad purpose -- improvement of the administration of justice -- was rejected by the Court in *Keller* as a justification for the challenged bar lobbying expenditures, it was not rejected in that context because a broad justification is inevitably invalid. Rather, the Court in *Keller* stated that the government had a more limited purpose in countenancing the forced association attendant with an integrated bar association -- regulation of the legal profession and the improvement of legal services within the state. In *Abood* and *Keller*, the Court necessarily focused on the limited purposes which justify an agency shop or integrated bar because the objectors were being forced to associate with and finance the political activities of one viewpoint-specific organization.

In contrast here, the student activity fee is justified by a broad purpose because it creates an open forum and does not compel association with a specific speaker. The purpose of the mandatory student fee is to encourage "wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues." *Keyishian*, 385 U.S. at 603 (internal quotations and citation omitted). Under the *Abood* analysis, that purpose is served by funding a diversity of organizations and by permitting organizations to speak out on a wide variety of political, controversial and socially significant topics. The activities of the funded organizations are germane to the purpose

of the fee because they increase the number and variety of voices engaged in the university's marketplace of ideas.

The court below also erred in focusing on whether the challenged organizations themselves had a sufficiently educational purpose. *See Southworth*, 151 F.3d at 725. Because the university uses the activity fee to promote a forum, not to promote the particular positions of any of the funded groups, the proper question is whether the creation of a forum serves the university's educational goals. The question is not whether the individual speakers independently supported by the forum serve that educational purpose. The collective purpose of the mandatory student activity fee is to create an opportunity for the sharing of diverse viewpoints. The viewpoints expressed there, whether they involve religious, political or social topics, are germane to that purpose.

III.

THE DECISION BELOW UNDERMINES FUNDAMENTAL FIRST AMENDMENT PRINCIPLES

While student activity fees are not part of a general tax designed to raise revenue for the university, *see Rosenberger*, 515 U.S. at 840, the fees nonetheless constitute "public funds" because they are exacted by the public university, attendance at the school is conditioned upon their payment, and the disbursement of the fees is overseen by university officials. *See In re Smith v. City Univ. of N.Y.*, 92 N.Y.2d 707, 716 (1999) (holding that mandatory activity fees at public community college are public funds); 35 Op. Att'y Gen. 183 (Mont. 1974) (concluding that mandatory student fees are public funds because the authority to impose them is vested in the university system's governing board and the fees are subject to its ultimate control and supervision); *Southworth v. Grebe*, 151 F.3d at 719 (Board

of Regents assesses the fee, which is required to obtain grades and graduate, and has ultimate authority to approve or disapprove the student government's allocation decisions (construing Wis. Stats. § 36.09)); *see also* N.Y. Comp. Codes R & Regs, tit. 8, § 302.14(c) (payment of fee is required at registration and allocation determinations of student government are subject to ultimate review by university's chief administrative officer).

When viewed as public funds, two important consequences follow. First, the fee becomes like a governmental appropriation which unquestionably may be used to further private political speech, notwithstanding the objections of individual taxpayers. *See Buckley v. Valeo*, 424 U.S. 1, 92 n.124 (1976) (rejecting taxpayers' claim that check-off system for funding presidential campaigns compelled individuals to finance the dissemination of ideas with which they disagreed because this was simply a means to determine the amount of government appropriation). In *Buckley*, the Court, in rejecting a First Amendment challenge to an appropriation scheme for the financing of presidential election campaigns, noted that "every appropriation made by Congress uses public money in a manner to which some taxpayers object." 424 U.S. at 92; *see also Keller*, 496 U.S. at 12-13 ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."); *cf. United States v. Lee*, 455 U.S. 252, 260 (1982) (holding that individuals may not resist payment of taxes on ground tax system conflicts with religious beliefs).

Second, the fee becomes more akin to other university exactions like tuition which may also fund controversial political speech. If students can successfully object to the use of a mandatory student activity fee, could they likewise object to that

portion of their tuition payment which supports academicians who voice controversial political viewpoints through their university research and professional writings? It is of no constitutional significance that most state universities choose, as a matter of educational and administrative policy, to charge a mandatory student activity fee that is separate and apart from other required payments such as tuition. Once it is recognized that the viewpoints expressed in the forum, like the viewpoints of the university professors, are not attributed to other students merely on the basis of their payment of the fee, then an objection to the activity fee becomes indistinguishable from an objection to uses of tuition funds.

The ability of students to withhold tuition from financing certain teachers based upon their political and ideological viewpoints would be wholly antithetical to the important First Amendment interests protected by the strong tradition of academic freedom. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.); *Keyishian*, 385 U.S. at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Indeed, this Court has recognized that academic officials must be given broad lee-way in determining how the university's scarce resources are spent. *See Widmar*, 454 U.S. at 276. Objections to the mandatory student activity fee on the ground that it makes available certain controversial viewpoints must therefore be rejected as contrary to the First Amendment and the university's role as a "marketplace of ideas." *See Healy v. James*, 408 U.S. 169, 180 (1972).

Finally, the scope of the ruling of the Court of Appeals is problematic. The court held that the objecting students' fees could not be used to fund *organizations* which engage in political speech or activity. It is not only the specific political activities which risk funding loss, but the organizations themselves. Allowing objecting students to withhold their fees from certain groups will reduce the funding available to those

groups and jeopardize their existence. *See Carroll v. Blinken*, 957 F.2d 991, 1001-02 (2d Cir. 1992) ("Clearly, the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities."). Consequently, the very existence of the forum as an opportunity for "uninhibited, robust, and wide-open" public debate, a core value of the First Amendment, will be jeopardized. *See Southworth v. Grebe*, 157 F.3d 1124, 1129 (7th Cir. 1998) (Wood, J., dissenting from denial of rehearing en banc).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Dated: Albany, New York
June 14, 1999

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York
Counsel for Amici States

PREETA D. BANSAL
Solicitor General and Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

LAURA ETLINGER
Assistant Attorney General

Of Counsel

(38)

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In the Supreme Court of the United States

OCTOBER TERM, 1998

Board of Regents of the University of Wisconsin System, et al.,

Petitioners,

v.

Scott Harold Southworth, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE STATE OF OREGON AS AMICUS CURIAE SUPPORTING PETITIONER

HARDY MYERS
Attorney General of Oregon
DAVID SCHUMAN
Deputy Attorney General
***MICHAEL D. REYNOLDS**
Solicitor General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Amicus Curiae

*Counsel of Record

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QUESTION PRESENTED

Whether a public university violates a student's First and Fourteenth Amendment rights by requiring him or her to pay an "incidental" or "activity" fee and then using part of that fee to fund a variety of groups, selected according to content-neutral eligibility criteria, even if some of those groups engage in political or ideological advocacy or activity that the student opposes.

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INTEREST OF THE STATE OF OREGON

The State of Oregon shares an interest in this case with other states and has a unique interest as well.

I. Oregon's shared interest.

Like Wisconsin and many other states, Oregon has a system of higher education whose member institutions collect from their students a mandatory "incidental fee" and use a part of it to fund a variety of groups, some of which engage in political or ideological activity. Also in common with other states', Oregon's higher education administrators regard this forum of organizations as an important part of students' education and maintaining it as an important aspect of the universities' educational mission. If this Court affirms the opinion of the United States Circuit Court for the Seventh Circuit in this case, it will at least undermine the vitality of these fora and perhaps eliminate many of them altogether.[1]

Further, the logical momentum of the Seventh Circuit's opinion pushes public higher education in a dangerous direction. As that court recognizes, its reasoning leads inevitably to the following Draconian conclusion: "[I]t is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights." *Southworth v. Grebe*, 151 F.3d 717, 730 n.11 (1998). The *Southworth* plaintiffs, for whatever reasons, chose not to challenge the student newspaper, the Distinguished Lecture Series, student government organizations, or tuition-funded speech. *Id.* at 720. But the

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[1] Oregon concurs in the arguments set forth in the Amicus Curiae brief of New York in support of Petitioners.

sweeping language of the *Southworth* court clearly and correctly demonstrates that, had plaintiffs chosen to challenge *all* student-funded activities or groups that engaged in political or ideological speech, the challenge would have succeeded. Fee-funded campus activities involving speech—the newspaper, radio and television station, websites, lecture series, student organizations—would be silenced, or turned into vacuous purveyors of sports stories, class schedules, social activities and Greek gossip.

Other casualties lie even closer to the core of higher education's mission. Like students from other universities, University of Oregon students pay tuition that is used to create, support, staff and organize externships. Students work for state and federal legislators, for state and federal agencies, for Legal Aid, for District Attorneys, for charities and for businesses. Their labor amounts to a cost-free subsidy of these organizations. Under *Southworth*, many of these placements would violate the First Amendment rights of a student who disagrees with the host organization's ideology or politics because student fees are being used to support the "offensive" speech of a private organization.

Ultimately, the logic of *Southworth* undermines the very nature of higher education in a democracy. Although the Seventh Circuit's holding that students may not be "forced to financially subsidize speech with which they disagree," *id.* at 721, applies by its terms only to the subsidized speech of "private organizations," *id.* at 718, 722, 725, nothing in the opinion reveals a principled method to distinguish that speech from the university's own speech, including the curricular or

published speech of its faculty. The court explains the difference between prohibited subsidies to private-organization speech and permitted subsidies to university speech as follows:

> [U]nlike, for example, a political science class on socialism, the International Socialist Organization is only incidentally concerned with education. Its primary goal is the promotion of its ideological beliefs. The fact that some educational benefit may come from it is secondary, and therefore not sufficiently germane to overcome the objecting students' constitutional rights.

Id. at 725.

Both private organization speech and curricular speech would be subjected to the same analysis focussing on the speech's "germaneness" to the university's educational mission, the governmental policy advanced by the speech, and the degree to which it offends the students' freedom from compelled expression. *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991). Curricular speech would fare slightly better than private organizations' speech, to the extent that the former could more easily be justified as primarily educational. But the fact remains that *Southworth* invites a regime in which any student's objection to the allegedly political or ideological content of a faculty member's teaching or publication is measured against some determination of whether this expression is primarily educational or primarily political. Compounding the harm this rule would inflict on higher education is the Seventh Circuit's narrow definition of what

qualifies as "primarily educational": only those expressions or activities that obviously and directly educate students. *Id.* at 724–27. Thus, for example, a law professor whose scholarship contributes to the debate on tort reform by arguing that society is disserved by punitive damage awards, will have her work subjected to institutional and ultimately to judicial scrutiny in order to determine if its "primary" purpose is "directly" to educate students, or whether that purpose is subordinate to the "ideological" agenda of the insurance defense bar. Yet it is emphatically the mission of the modern university to avoid this kind of scrutiny—to *encourage* expression that is unconstrained by the need to appease anybody's political sensibilities.

Indeed, in this and other respects the underlying premise of the Seventh Circuit opinion is antithetical to the premise underlying democratic higher education. The Seventh Circuit finds offense in requiring students to pay for the expression of ideas they oppose; higher education, on the other hand, rests on the idea that students cannot legitimately know what ideas they oppose until those ideas have been thoroughly articulated. For that reason, this Court has always found that the Constitution not only permits, but protects, the "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues'." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (internal citation omitted). Presumably that exchange of ideas is equally vital when the "multitude of tongues" includes those that are funded by incidental fees as well as those funded by tuition.

II. Oregon's unique interest

In 1995, a group of University of Oregon students sued the Oregon State System of Higher Education, along with several university administrators and other public officials, alleging that the University's use of mandatory incidental fees to fund the Oregon Student Public Interest Research Group Education Fund (OSPIRG EF) violated the students' speech and associational rights under the First and Fourteenth Amendments. The District Court granted the State's motion for summary judgment and dismissed the case. A three-judge panel of the Ninth Circuit affirmed. *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (1999). Plaintiffs filed a Petition for Reconsideration and Suggestion for Rehearing En Banc. In an Order filed on May 3, 1999, the Panel informed the parties of its decision to "defer further action * * * pending resolution of *Board of Regents v. Southworth* * * *."

Oregon, then, has an immediate and concrete interest not only in the outcome of *Southworth* but in the degree to which that outcome depends on facts that are particular to that case and different from the facts in *Rounds*. As the Ninth Circuit noted, resolution of cases involving the use of compelled fees for political speech "necessarily involves a fact-intensive inquiry." *Rounds*, 166 F.3d, at 1037. Oregon's objective in appearing as *amicus curiae* is to ensure that this Court does not decide the case before it in terms that may be inadvertently overbroad. For that reason, Oregon quotes the following factual determinations from the Ninth Circuit panel opinion:

[Incidental] Fees are authorized by Oregon statute to finance programs the Board of Higher Education deems "to be advantageous to the cultural or physical development of students." OR. REV. STAT. § 351.070 (3)(d) (1997).

The University has developed an elaborate system to ensure compliance. In order to qualify for funding, an organization must first be recognized by the Associated Students. Criteria for recognition includes a requirement that the organization engage in activities of common interest to students. If recognized, the organization may apply for funding by submitting a budget request. Organizations then can receive funding by either approval of a majority vote of the entire student body or through a budget process that includes approval of various committees of the Associated Students as well as the Student Senate. The budget allocation also must be approved by the President of the University and the Board of Higher Education.

* * * *

Over eighty University organizations, including athletic, culturally-oriented, and political groups, received funding from the Fees during the 1995–96 academic year.

Among the groups that received funding was the OSPIRG EF, a statewide organization run entirely by students to address issues of concern to students.* * * OSPIRG EF is a nonpartisan organization funded entirely by student activity fees that aims to develop students' potential to become educated and responsible citizens who are informed about the American legislative process and political system. Towards this end, the OSPIRG EF offers students the opportunity to ex-

plore public policy issues, participate in extracurricular activities, organize and engage in community service efforts, and acquire leadership skills. Although students are responsible for running and governing the OSPIRG EF at both the local and the state levels, a paid professional staff is available to assist the student workforce.

* * * *

[W]e note that * * * Students are not afforded "automatic membership" by paying the Fees, nor are the Students required to participate in OSPIRG EF's activities. Under the Oregon system, the Fees are allocated among scores of campus organizations representing many diverse viewpoints. Membership in any campus organization is elective.

* * * *

Finally, we must underscore that the Oregon system differs markedly from other state PIRGs whose funding by university students has received judicial scrutiny. * * * Under the Oregon scheme, the OSPIRG EF is a separate entity from the Oregon State Public Interest Research Group ("OSPIRG"), an organization that does engage in legislative lobbying and more overtly political action. No Fees are allocated to OSPIRG; only OSPIRG EF receives funding. Thus, the Oregon system bisects political and educational functions and limits university funding to educational activities.

* * * *

* * * The record indicates that OSPIRG EF * * * is a non-partisan organization whose objective is to provide college students hands-on experience in recog-

nizing, researching and solving the problems of society.

* * * *

166 F.3d, at 1034–39 (paragraphs re-arranged; internal citations omitted). Oregon, then, has a system for collecting, distributing, and using students' incidental fees that differs markedly from many other states. Oregon respectfully requests this Court to recognize these differences to the extent that they might be implicated in its opinion.

SUMMARY OF ARGUMENT

The analysis derived from the context of labor law cases, in particular from *Lehnert v. Ferris Faculty Assn.*, has little or no relevance in the higher education context. Spending a worker's union dues to promote the union's political agenda bears no resemblance to spending a student's incidental fee exaction to sponsor a forum consisting of groups and activities chosen without regard to their political or ideological stance.

ARGUMENT

Government can compel monetary contributions from citizens; it can also sponsor and engage in ideological expressive activity. U.S. CONST, art. I, § 8 (power to tax); *Rust v. Sullivan*, 500 U.S. 173 (1991) (power to espouse and sponsor ideological speech). Paradoxically, however, using mandatory exactions to fund ideological expression raises issues under the First Amendment. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). This paradox results from the interaction of two principles. One is that the First Amendment

protects not only the right to speak freely but the right to be free from compelled speech. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The second is that spending money to fund political advocacy is itself a form of political advocacy. *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, compelling citizens to expend money and then using that money to facilitate or sponsor political advocacy is to compel citizens to engage in political advocacy.

The First Amendment interest in freedom from compelled support of political speech, however, is not absolute. To take an obvious example, tax money funds the streets, parks, and other public fora wherein passionate political advocacy occurs and is not only permitted but protected. *E.g., Hague v. CIO*, 307 U.S. 496 (1939) (streets); *Widmar v. Vincent*, 454 U.S. 263 (1981) (university campus; religious speech). If every citizen had the right to veto government expenditures that supported expressive activity with which he or she disagreed, "debate over issues of great concern to the public would be limited to those in the private sector.* * *" *Keller v. State Bar of California*, 496 U.S. 1, 12–13 (1990). The courts have therefore formulated guidelines to sift permitted compulsory extractions from impermissible ones. That process began in cases involving public labor law (including the law governing an integrated bar association). The basic principles announced in those cases, however, do not translate sensibly into the context of higher education.

The most recent of the labor cases, *Lehnert v. Ferris Faculty Assn.*, summarizes the earlier ones by announcing the following test: using a mandatory exaction of union dues to

fund political expression is constitutional only if the expression is "germane to collective bargaining; justified by the government's vital policy interest in labor peace and avoiding 'free-riders'; and does not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.

The Seventh Circuit opinion in *Southworth* is a straightforward (albeit flawed) application of this test from *Lehnert*, using an extremely stringent definition of "germane." Incidental fees substitute for union dues; education substitutes for labor peace; and the burden on the dissenting fee-payers remains constant. The rule thus translates approximately as follows: mandatory incidental fees can be used to subsidize university activities involving advocacy or political speech if the activities are directly and primarily for the purpose of educating students, and do not significantly add to the burdening of free speech that is inherent in the requirement that students pay an "incidental" or "activity" fee.

But these substitutions result in a distorted analysis. As this Court has frequently recognized, one of the essential functions of higher education (as distinct from organized labor) is to provide intellectual debate, including political and ideological debate. *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S., at 603. Providing students with exposure to a diversity of viewpoints, in fact, is such a vital state interest that it justifies an exception to even the most fundamental mandate of the Equal Protection Clause—governmental neutrality in matters of race. *Regents of Univ. of*

California v. Bakke, 438 U.S. 265 (1978). The purpose of the university's "incidental fee" or "student activity" exactions is to serve that vital state interest by creating and exposing students to a broad spectrum of subjects, viewpoints and expressive opportunities. Thus, any first amendment analysis of student incidental fee uses must take account of the fact that the state's interest in allowing ideological expression is more important in the university than in the workplace. The exchange of ideological or political views is not only *germane* to the mission of the university; it *is* one of the missions of the university.

Further, the First Amendment offense caused by the compelled expression is radically *less* in the university context when the allegedly offending group is funded as part of a unitary fee assessment because, unlike the union dues-payer, the student fee-payer is sponsoring a forum that embraces a variety of ideological, religious, philosophical and other viewpoints. Dues payers who dissent from their union's or bar's position suffer a First Amendment injury because their viewpoint is not given voice by the group, and because the group voice that does speak contrary to their viewpoint will be attributed to them. Student fee-payers who dislike the ideological position of a funded group, on the other hand, may join other funded groups that are more congenial to their views—and if none exists they are free to form one.

For these reasons, direct translation of the analysis from labor cases into the university context makes no sense. One way to remedy this mismatch would be to recognize, in applying the *Lehnert* rule, that (1) the definition of

"germaneness" must be broad, because (as the *Southworth* court recognizes, 151 F.3d, at 725) almost any activity or idea can be germane to the education of a student who participants in or learns about it; (2) the governmental interest in providing a broad spectrum of viewpoints and activities for university students is vital and self-validating; and (3) the burden on fee-payers will be small so long as the fees are used to fund organizations representing a spectrum of ideologies chosen on a content-neutral basis, access to that forum by new organizations remains open, and no student is considered a "member" of any organization by virtue of his or her mandatory funding.

Alternatively, this Court could simply retain the *Abood-Keller-Lehnert* analysis for labor cases, and acknowledge what is already implicit in *Rosenberger v. Rector and Visitors of the Univ. of Va.*., 515 U.S. 819 (1995) that universities' incidental fee exactions are different from union dues, and they are especially different when the exactions are used to fund a multi-organization menu of student-serving organizations. In this analysis, fee systems such as Wisconsin's, at issue in this case, and Oregon's, at issue in *Rounds*, would survive, as would others in which student fees fund a variety of organizations chosen under criteria that are content and viewpoint neutral, open to all applicants, with no membership implied by an individual's fee payment.

CONCLUSION

For the reasons stated above, the judgment of the U.S. Seventh Circuit Court of Appeals in *Southworth v. Grebe* should be reversed.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
DAVID SCHUMAN
Deputy Attorney General
MICHAEL D. REYNOLDS
Solicitor General
Counsel for Amicus Curiae

June 14, 1999

(16)

No. 98-1189

IN THE

Supreme Court of the United States

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *et al.*,
Petitioners,

v.

HAROLD SOUTHWORTH, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE NATIONAL SMOKERS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

RENEE GIACHINO *
NATIONAL SMOKERS ALLIANCE
901 N. Washington St.
Suite 400
Alexandria, VA 22314
(703) 739-1324

JOHN YOO
BOALT HALL SCHOOL OF LAW
University of California
Berkeley, CA 94720
(510) 643-5089
Institutional Affiliation for Identification Purposes Only

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE NATIONAL SMOKERS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The National Smokers Alliance is a non-profit membership organization composed of adults who support the accommodation of smokers and non-smokers in public places and in the workplace, and who oppose government-imposed smoking bans and the excessive taxation and regulation of tobacco products. The National Smokers Alliance, which has a total membership of approximately 3,000,000, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

The First Amendment's protections for the freedom of speech include the right of each citizen not to speak. As part of this right, individuals cannot be forced to support, either through their actions, speech, or financial means, the dissemination of ideas with which they disagree. A particular threat to the right against compelled speech arises when the government imposes a discrete fee to be used to fund speech with which the fee-payers disagree. Where, as here, the state requires such a mandatory payment, this Court has recognized only limited exceptions to the First Amendment's broad protections. None of the circumstances of this case justify expanding a narrow exception to the Free Speech Clause to include the millions of students, faculty, and staff on the nation's college and university campuses.

Because the university setting is sharply different from the contexts within which this Court has permitted mandatory fees to fund speech, this Court should refuse to

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

apply the analysis of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Instead, petitioners' compulsory fees should be subject to the standards of review that apply to government attempts to burden speech in the public sphere. Cases such as *Abood* and *Keller v. State Bar of California*, 496 U.S. 1 (1990), have allowed mandatory fees because the state was advancing a government objective in which success was utterly dependent on the collective participation of all in the affected class. In such cases, compelled association and dues overcame free-rider problems that threatened to doom the very existence of a state-promoted institution. Here, by contrast, no state interest justifies the forced collectivization of student efforts and resources.

This case's setting in the college and university context demands that any state burdens on free speech rights receive the strictest of scrutiny. Simply because respondents are in college, and not the public sphere, the state does not have greater freedom to trample their constitutional rights. Cases that have recognized reduced constitutional rights in schools usually have occurred in the primary and secondary school context, where the needs of educators to maintain order and safety are paramount. In the university setting, by contrast, students are adults who enjoy full political rights and are part of a community that should receive the same constitutional treatment as the public sphere.

Application of the First Amendment's bar on compelled speech threatens neither the State's right to make academic choices nor the academic freedom of professors and students. Petitioners' fee funds student-run activities that take place outside of the classroom; these student groups are not under direct faculty supervision, there are no classroom discussions or lectures, and there are no formal

evaluations of student performance. Prohibition of the fee does not prevent the university from deciding what courses to offer, nor does it interfere with classroom education.

Petitioners' mandatory fee should receive strict scrutiny. In its other compelled speech cases, this Court implicitly has used this standard when plaintiffs have challenged government efforts to force them to support speech with which they disagree. In such cases, the funding of other speech with which the objecting fee-payers might agree does not provide a cure for the violation of free speech rights. Instead, this Court has invalidated the fee automatically. The mandatory fee forces objecting students to replace the speech that they would support with their funds with speech chosen by the university and its student groups. Even if this Court were to conclude that petitioners' funding scheme were content-neutral, recent cases support affirming the decision below. This Court has never held that the state can achieve the goal of creating a virtual public forum—solely for the purpose of promoting the expression of diverse viewpoints—by compelling dissenting citizens to contribute financially through a special fee. It should not do so now.

The limited evidence that we have concerning the original understanding of the First Amendment supports the principle that the government cannot use mandatory fees to support speech with which the payers disagree. In examining these issues, Justices and legal scholars have long looked to the Virginia "Assessment Controversy" for guidance as to the intentions and beliefs of those who wrote the First Amendment. While the Assessment Controversy occurred five years before the ratification of the Bill of Rights, its involvement of many of the leading founders, in the most important state of the early repub-

lic, and its airing of many of the key arguments and issues, justifies its relevance for interpretation of the First Amendment. Close examination of the Assessment Controversy indicates that some of the leading framers would have understood the emerging First Amendment to bar the imposition of discrete taxes to fund political or ideological speech. Efforts by key founders, such as Thomas Jefferson and James Madison, to disestablish the Anglican church represented a broader belief that the state should not be in the business of shaping citizen's minds and views. Central to their efforts was the idea that the government could not force individuals to pay for the dissemination of ideas with which they disagree. This singular historical event lends important support for the same principle embodied in this Court's case law and its application to the case at hand.

ARGUMENT

The First Amendment guarantees a citizen's right to remain silent, just as it protects the right to speak. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), read the Free Speech Clause to prohibit states from compelling public school students to salute and pledge allegiance to the American flag. As Justice Murphy observed in *Barnette*, the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 645 (Murphy, J., concurring). *Wooley v. Maynard*, 430 U.S. 705 (1977), extended this principle to prohibit states from forcing drivers to display the state motto on their license plates, and *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), invalidated a state rule that required a utility to distribute an unwanted consumer organization's communication. *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). As this Court declared

in *PG&E*: "the essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the ultimate end as freedom of speech in its affirmative aspect." 475 U.S. at 11 (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524, 559 (1985) (quoting *Estate of Hemingway v. Random House*, 23 N.Y. 2d 341, 348 (1968) (emphasis in original)).

As these cases demonstrate, the Free Speech Clause bars the government from compelling individuals to support, either through their actions, speech, or financial means, the dissemination of ideas with which they disagree. This principle applies regardless of whether the government actually forces individuals to speak, as in saluting the flag, or compels them to pay funds that support speech with which they disagree. See *Keller*, 496 U.S. 1; *Abood*, 431 U.S. 209. As this Court recognized in *Buckey v. Valeo*, 424 U.S. 1 (1976), the First Amendment protects, as speech, financial contributions to an organization for the purpose of political speech. *Id.* at 22-23. Both forced speech and forced contributions, therefore, strike at the very heart of the First Amendment "notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." *Abood*, 431 U.S. at 235 (citations omitted). That core First Amendment principle is violated by the petitioners' effort to force respondents to contribute financially to support political speech with which they disagree.

I. THE UNIVERSITY CONTEXT DOES NOT JUSTIFY THE VIOLATION OF A CITIZEN'S FIRST AMENDMENT RIGHT AGAINST COMPELLED POLITICAL SPEECH

A particular threat to the right against compelled speech arises when the government imposes a discrete fee to be used to fund political and ideological speech. Where, as here, the state requires such a mandatory payment, this Court has recognized only limited exceptions to the First Amendment's broad protections against compelled speech. In such cases, the Court has allowed mandatory fees *only* when the state was advancing a government objective that required the collective participation of all in the limited, affected class in order to succeed. This case—which involves universities, rather than union shops or bar associations—bears no similarities to situations in which the Court has allowed mandatory fees. Because the university setting is vastly different from these other contexts, this Court should subject petitioners' activities fees to the normal standards of scrutiny that apply when government burdens political speech.

In the context of agency shop rules, for example, this Court has held that the government may compel non-union teachers to contribute financial dues to the union that negotiated their collective bargaining agreement. *Abood*, 431 U.S. 209. Although the non-union teachers held a right against compelled speech, this Court found that the government had a legitimate interest in promoting the union shop to prevent free-riding by non-union workers on a union's collective bargaining efforts. *Id.* at 222; *see also Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961). In order to accommodate both interests, *Abood* held that the union could use the funds of objecting non-union teachers for collective bargaining activities, but not

for the espousal of political or ideological causes, unrelated to collective bargaining, with which the teachers disagreed. *Id.* at 235-36. The mandatory fee prevents those who benefit from union representation from avoiding their fair share of the cost.

Similarly, in the context of state bar associations, this Court has recognized that the *Abood* exception to the First Amendment's ban on compelled speech applies only because of the role of the bar in regulating the legal profession. In *Keller v. State Bar of California*, this Court found that lawyers benefited from the unique status of an integrated bar in a manner analogous to the way employees gained from union representation. 496 U.S. at 12. State law required bar membership and dues as a condition of practicing law in the state. In return, the bar engaged in a number of functions to regulate the practice of law, such as examining applicants for admission, formulating rules of professional conduct, and disciplining lawyers for misconduct. *Id.* at 4-5. For an integrated bar to succeed in the self-regulation of the legal profession, all practicing lawyers must be members; lawyers benefit by avoiding more direct state supervision and by being admitted to the practice of law. *Id.* at 12-14. Thus, in cases where the bar is acting in its role as a professional adviser to those ultimately charged with the regulation of the legal profession, the First Amendment does not prohibit the use of dissenting members' funds. *Id.* at 15. But when those funds are used for political or ideological speech unrelated to those goals, the Free Speech Clause is offended. As this Court noted, compulsory bar dues could not be used to endorse or advance "a gun control or nuclear weapons freeze initiative," but they could be used for activities connected with disciplining members of the bar. *Id.* at 16.

This Court has allowed mandatory fees for compelled speech in only these two narrow circumstances. If the state interest in assuring successful regulation requires "compelled association," *id.* at 13, then it can compel financial contributions for the support of speech, but only if that speech is related to the purpose of a valid regulatory framework. In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984) and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), this Court refined the *Abood* analysis to bar the expenditure of dissenting employees' dues on speech that was not "germane" to collective bargaining activities. *See also Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). As recent cases have explained, the state may use mandatory fees to fund speech only if the speech is "germane" to the regulation's objectives, it is justified by the government's vital policy interests, and it does not significantly burden free speech interests. *See Lehnert*, 500 U.S. at 519; *Ellis*, 466 U.S. 435; *see also Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. 2130, 2146 (1997) (Souter, J., dissenting).

Aside from the unique situations created by union shops and state bars, this Court has refused to broaden the narrow exception for compelled political speech. While the Court recently upheld a federal agricultural marketing program that compelled contributions in order to pay for generic advertising, *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. 2130 (1997), it found that the First Amendment's bar on compelled speech was not implicated because the advertising constituted commercial speech. *Id.* at 2138, 2140. *Glickman* does not apply where, as here, the compelled speech is of a political and ideological nature. The Court has never extended the *Abood* analysis to the different, if not unique, context of the university—nor should it.

Although the lower courts that have addressed this issue have adopted the *Abood* approach, *see, e.g., Southworth v. Grebe*, 151 F.3d 717, 722-23 (7th Cir. 1998); *Galda v. Rutgers*, 772 F.2d 1060, 1063-64 (3d Cir. 1985); *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983); *Smith v. Regents of the University of California*, 4 Cal.4th 843, 844 P.2d 500, 511 (Cal.1993), they have done so without analyzing whether the standard of scrutiny that applies in the public sphere, rather than in the workplace, is more appropriate. To be sure, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), Justice O'Connor's concurring opinion appeared to suggest that the *Abood/Keller* approach might apply to mandatory student fees. *Id.* at 851 (O'Connor, J., concurring). But Justice O'Connor's concurrence only cited *Keller* and *Abood* to make clear that *Rosenberger*'s requirement—that a state university distribute student activity funds in a content-neutral manner—did not address the constitutionality of the collection of the fees themselves. *Id.* ("Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees."). In this regard, the dissenting judges of the Court of Appeals for the Seventh Circuit, sitting *en banc*, incorrectly concluded that *Rosenberger* dictated an opposite outcome in this case. *Southworth v. Grebe*, 157 F.3d 1124, 1127-28 (1998) (denial of petition for rehearing en banc) (Wood, J., dissenting). *Rosenberger* only required the University of Virginia to disburse funds to groups in a content-neutral manner; as Justice O'Connor's concurrence notes, *Rosenberger* ex-

pressly did not reach the constitutionality of the collection of the funds in the first place.

In the absence of any commonalities among union shops, integrated bars, and universities, this Court should refuse to expand a narrow exception to the free speech rights of the nation's citizens. Union shops and integrated bars share few, if any, similarities with the university setting. In the former case, compelled association and dues are necessary order to overcome free-rider problems that may doom the very purpose of state regulation. Here, by contrast, there is no vital state interest that requires the forced collectivization of student efforts and resources. Petitioners do not claim that respondents benefit from, without paying for, the efforts of other students in organizing groups and engaging in campus debate in such a manner that defeats the objectives of the university. Respondent students do not want to free-ride; they want to exit.

Further, the state does not have a vital interest in regulating the speech of college and university students by levying a mandatory speech tax. Achieving the state's interest does not require the financial contribution of all university students. There is no showing that campus organizing and speech would seriously decline in the absence of a compulsory fee. Mere speculation that a drop in such activity would occur cannot form the basis for the infringement of students' free speech rights. Cf. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986). In fact, unlike other compelled speech cases, here the state has conditioned the receipt of a public benefit—college and university education—on the payment of a fee that burdens students' free speech rights. This Court should demand that compelling government interests are

at stake before it expands an exception to the First Amendment's guarantee for freedom of speech to the many public college and university students in the country.

Close examination of the university context shows that the First Amendment does not permit the state to violate the free speech rights of university students. Respondents' status as college students does not provide the state with greater freedom to trampel their constitutional rights. As this Court has made clear before, "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). To be sure, this Court has recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Ibid.* In certain circumstances, the constitutional rights of students have less force in the face of reasonable regulations designed to maintain educational goals, discipline and safety. *Id.* at 507; *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 250 (1988).

For the most part, however, these cases have found lesser protections for students' constitutional rights in the context of primary and secondary schools, not colleges and universities. *Cf. Rosenberger*, 515 U.S. at 835-36; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); *Healy*, 408 U.S. at 180. In contrast to primary and secondary education, college and university students are adults who make many of the education and

lifestyle choices that schools and parents make for younger children. Most college and university students can vote, and hence they need the full panoply of political rights guaranteed by the Constitution to allow them to be active citizens. They participate in an educational community based on the free exchange of ideas and criticism. "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Healy*, 408 U.S. at 180-81. Allowing students to enjoy the full exercise of First Amendment rights constitutes an important part of their education and of the pursuit of truth. "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

While this Court has recognized that the free expression of ideas is central to the mission of the university, it has not found that the university can force students to take part in the vigorous give-and-take of extracurricular life. To do so would violate the First Amendment rights of students against compelled speech. In fact, compelled speech may cause more damage in the university setting, which is particularly devoted to the development of the intellect through speech, than in the ordinary public sphere. As this Court observed in *Rosenberger*, the "danger" of the violation of First Amendment rights "is especially real in the University setting, where the State acts against a background and tradition that is at the center of our intellectual and philosophic tradition." 515 U.S. at 835. By collecting mandatory fees, and then re-distributing them according to its own formula, the university has intervened in the marketplace of ideas. Such intervention distorts the natural workings of the market for speech and ideas, just as surely as it would if the government taxed individuals and used the revenues to make production decisions for a consumer good. Without a showing of any "market failure" in the unfettered operation of the campus speech market, such heavy-handed government intervention invariably produces results that will vary from that which would obtain if students were free to make their own decisions. It would be ironic, to say the least, if this Court allowed a student's first introduction to the First Amendment to take the form of compelled speech, in the form of mandatory fees to pay for the speech of others.

Further, while colleges and universities surely must maintain a certain level of order, it does not approach the level necessary in the primary and secondary school systems. It is in regard to the education of the young and immature where the need of states and school officials to maintain order and safety is greatest. Even if this also were true at the college level, this Court has rejected the notion that the need for order justifies restrictions on free speech rights in the university. As this Court said in *Healy*, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180.

To be sure, this Court also has expressed concern for the "right of the University to make academic judgments as to how best to allocate scarce resources," *see Rosenberger*, 515 U.S. at 833-34; *Widmar*, 454 U.S. at 276, which it has recognized as a variant of the right of the state, when it is the speaker, to make content-based choices. Thus, the university may determine what courses to offer. Cf. *Rust v. Sullivan*, 500 U.S. 173 (1991). To

husband its resources, it can impose reasonable time, place, and manner restrictions on speech, and it can decide to bar the use of university facilities to non-university personnel. *Widmar*, 454 U.S. at 268 n. 5. Somewhat related to this doctrine is the First Amendment's protection for academic freedom, which "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603.

These doctrines, however, do not alter the First Amendment rights of adult students against compelled speech. Under the guise of making academic choices about teaching and research, petitioners could not force students to advocate required beliefs. Cf. *Barnette*, 319 U.S. at 634. Even in the name of academic freedom, professors and state officials could not use classroom instruction to force students to adopt specific tenets of belief, nor could they convert educational resources to advance their preferred causes. Similarly, vague claims of academic freedom or educational goals cannot allow petitioners to force objecting students to fund political or ideological speech, when the First Amendment would bar such compelled speech in the public sphere. This Court owes petitioners no deference in the definition and advancement of their compelled speech program.

Furthermore, here neither the State's right to make academic choices nor the academic freedom of professors and students are jeopardized by a bar on mandatory speech fees. Petitioners' compelled fee funds student-run activities that take place outside of the classroom; these student groups are not under direct faculty supervision, there are no classroom discussions or lectures, and there are no formal evaluations of student performance. Prohibition of the fee does not prevent the university from deciding what courses to offer, nor does it interfere with classroom education. At worst, application of the First Amendment's

compelled speech doctrine only limits the means by which the university may establish a certain type of campus atmosphere. Petitioners cannot show that, in the absence of the mandatory fee, vigorous debate and activity by student groups would cease. These groups are still free to continue as before; they just cannot force unwilling students to pay for their activities. Both the university and student groups are free to use other sources of revenue, so long as they do not originate from a discrete, mandatory fee to be used for speech purposes.

II. PETITIONERS' FEE CANNOT SURVIVE FIRST AMENDMENT STANDARDS OF REVIEW

In order to prevail, therefore, the petitioners have the burden of showing why the university context is sufficiently analogous to *Abood* or *Keller* to justify employing *Abood's* lower standard of review at all. Because the university context does not justify the reduction of individual rights, this Court should apply the usual level of First Amendment scrutiny to petitioners' mandatory fee. Here, petitioners impose a fee that funds political and ideological speech with which respondent students disagree. First Amendment principles as well as established case law make clear that such a fee, imposed outside of a union shop or a bar association, violates the First Amendment. Wisconsin, for example, could not impose a discrete speech tax on its citizens to fund speech which promotes the political or ideological views of the governor or the legislature. Otherwise, a Democrat- or Republican-dominated government could fund speech that seeks to convince voters to join its party. Similarly, Wisconsin cannot impose a tax to support different interest groups because of their political or ideological positions, or to fund a number of interest groups to ensure a diversity of views in the marketplace of ideas. Such efforts would

run counter to the First Amendment ideal that an individual's views should be shaped by his mind, rather than coerced by the state, *Abood*, 431 U.S. at 235, and the principle of popular sovereignty that the government should represent the views of the people, rather than impose its views on the people.

This Court should apply strict scrutiny to petitioners' mandatory fee. Even though petitioners' speech programs do not appear to facially discriminate on the basis of content in distributing student activity funds—in fact, under *Rosenberger*, the First Amendment prohibits petitioners from doing so—nonetheless, strict scrutiny still applies. In cases where the government has imposed a mandatory fee to fund speech, this Court has not found a compelled speech violation to be cured by the funding of other speech with which the payers might agree. In *Abood*, for example, this Court found the First Amendment violated because *some* of the dues were used to fund political or ideological speech with which the plaintiffs disagreed. Plaintiffs in *Abood* did not need to show that *all* of the funds were used for objectionable speech, *Abood*, 431 U.S. at 213, nor did the Court ask whether the plaintiffs agreed with some of the dues-funded causes and candidates. Similarly, in *Keller*, plaintiffs did not need to show that all of the state bar's lobbying and litigation positions were objectionable, only that some of them were. As in *Abood*, the Court did not inquire into whether the bar's other litigation and lobbying activities met with the plaintiffs' approval.

Neither *Abood* nor *Keller* deemed it relevant whether the collected funds were used for speech with which the plaintiffs agreed, as well as for speech with which they disagreed. This Court found that the rights of the objecting employees were violated if some—not necessarily all

—of the speech, funded by the mandatory dues, was of a political or ideological nature with which they disagreed. *Abood* recognized an exception from this bar on the use of mandatory fees only for speech that is germane to the purpose of the institution collecting the fee. For speech that is non-germane—in other words, political and ideological speech—this Court implicitly subjected the mandatory dues to strict scrutiny and invalidated them. Petitioners cannot cure the violation of respondents' right against compelled speech by arguing that the funds go to non-objectionable as well as objectionable speech.

Intermediate scrutiny, normally reserved for content-neutral regulations that impact upon speech, is not appropriate here. The state's mandatory fee scheme orders students to support certain kinds of speech, and it prevents students from choosing for themselves the speech that they would prefer to fund. Students may not wish to support speech by the formula chosen by petitioners—forcing students to obey that formula distorts the message that the students themselves might choose were they making their own funding decisions. The mandatory fee forces objecting students to replace the speech that they would support with their funds with speech chosen by the university and its student groups, which amounts to a content-based restriction. Cf. *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 795 (1988).

Furthermore, the state pursues a goal that itself represents a regulation of speech in regard to its content. To be sure, respondents established the speech scheme here to encourage the expression of a diversity of viewpoints, rather than to suppress speech. Even if the state, however, were to possess a benign, rather than malign, motivation in choosing to fund certain classes of speech, that does not entitle it to intermediate scrutiny. Cf. *R.A.V.*

v. St. Paul, 505 U.S. 377, 386 (1992). Although the state may not have an interest in suppressing speech, it still has engaged in the regulation of speech in relation to the content of the speech. Here, petitioners have sought to promote speech that it believes adds to the diversity of viewpoints expressed on campus. Promoting speech for the sake of diversity represents regulation based on the communicative impact of the speech as much as a law that barred certain speech for the purpose of suppressing diversity in the marketplace of ideas.

Petitioners have not even shown that the fees are distributed in a neutral manner. Every registered student organization that seeks funding is not guaranteed funding; rather, the university is distributing funds in order to ensure that certain viewpoints are represented on campus. In fact, the great majority of funds regularly goes to a relatively small number of groups. If the government collects a fee to fund speech, it cannot distribute the funds on the basis of content. Therefore, even if this Court were to allow mandatory fees that force payers to support speech with which they disagree, it should not do so in this case. While increasing the amount of campus speech arguably might rise to the level of an important government interest, it is by no means a compelling one. The lack of a compelling, or even a substantial, interest is demonstrated by the lack of evidence that any problems exist involving the level or diversity of campus speech in the absence of petitioners' mandatory activities fee.

Even if this Court were to conclude that the state had a compelling interest in promoting speech, petitioners have failed to demonstrate that their program is narrowly tailored to achieve this goal. Student groups, which have their own incentives and resources to engage in speech, are not going to disappear in the absence of petitioners' compelled speech program. The state also has failed to

demonstrate that the university lacks alternatives to fund student activities that would better avoid violating respondents' right against compelled speech. For example, the university could seek voluntary contributions from students or donations from alumni or outside organizations. If this Court is to allow the state to engage in programs that promote certain types of speech, its cases require that the state do so in a manner that is least intrusive upon the free speech rights of dissenting students. The First Amendment rights of respondents require petitioners to resort to alternative means to fund their speech program that do not compel contributions from unwilling students.

Even if this Court were to conclude that petitioners' funding scheme was content-neutral, recent cases support affirmance of the decision below. Petitioners, and the dissenting en banc judges below, claim that the mandatory fee is entitled to intermediate scrutiny because the funds are used to create a virtual public forum that does not discriminate on the basis of the content of speech. This Court has never held, however, that the state can achieve the goal of creating a virtual public forum by compelling dissenting citizens to contribute to it financially. In the most analogous case to address government-subsidized third-party speech, this Court suggested that a voluntary contribution system saved the legislative scheme from First Amendment problems. In *Buckley v. Valeo,* 424 U.S. 1 (1976), this Court upheld the 1974 Federal Election Campaign Act's provision for the public financing of presidential election campaigns. Under the statute, the federal government agreed to fund a presidential campaign if the candidate accepted spending and contribution limitations. *Id.* at 88. The Court found that the law did not involve any "compulsion upon individuals to finance the dissemination of ideas with which they dis-

agree," *id.* at 91 n.124, because the federal campaign contribution was funded by a voluntary check-off box on individual income tax returns. The *Buckley* Court also noted that taxpayers had no broad right to object to the expenditure of general revenue taxes for the general welfare. *Id.* at 90-92. A challenge to a spending program, however, could prove quite different if only a certain class of taxpayers were forced to pay by means of a specific, mandatory fee.

Turner Broadcasting System v. F.C.C., 512 U.S. 622 (1994), also should not be read to allow government to engage in speech-promoting activities paid for by dissenting individuals. In *Turner Broadcasting*, this Court upheld the "must-carry" provisions of the 1992 Cable Act, even though they amounted to compelled speech on the part of cable operators. *Id.* at 643-44. The Court concluded that the legislative scheme burdened speech without reference to content. *Turner Broadcasting*, however, did not address whether the government could impose a discrete fee, rather than dip into general revenues, for the specific creation of a speech-promoting program. In this respect, *Turner Broadcasting* was consistent with *Buckley's* effort to protect the federal government's control over its general revenues, without reaching the question of the constitutional rights of dissenting taxpayers when a specific fee is levied to pay for speech.

The government programs in *Buckley* and *Turner*, and public forum cases generally, are different from petitioners' compelled speech scheme in another important respect. In *Buckley* and *Turner*, the central object of the legislative program was not simply to enhance speech. In *Buckley*, Congress regulated the federal campaign contributions and expenditures in order to prevent corruption and safeguard the integrity of the electoral process. *Buckley*, 424

U.S. at 23-28. In *Turner*, Congress enacted the Cable Act's must-carry provisions to sustain the local television broadcast industry, which plays an important role in the dissemination of information and in the competition over television programming. *Turner*, 512 U.S. at 662-64. Taxes that pay for physical public forums, such as stadiums, parks, government buildings, and sidewalks, certainly create public spaces that can be used for speech, but the purpose for their construction is not solely, or even primarily, devoted to the promotion of speech. Rather, in all of these circumstances, the government has created a system, mechanism or place that benefits the public in ways that are unrelated to speech, but which also has speech-enhancing side effects. Thus, a sidewalk can be used for a public demonstration, but the government built the sidewalk in the first place for foot traffic and safety reasons.

Behind these examples is a distinction between a conduit for speech and the content of the speech itself. In a normal public forum case involving a physical forum, such as a park or a government building, or even a case involving an intangible forum, such as the realm of television programming, the government has created a facility that serves as the conduit for the expression of different ideas, without regard to the speech itself or its content. In this case, however, the petitioners' compelled speech program funds the favored speech itself, not the method for its communication. Without the petitioners' scheme, different student groups would simply engage in less speech overall, vis-à-vis other student groups on campus. A true public forum—one that served as a communications conduit that operated without regard to the content of speech—would raise the amount of speech for all groups in an equal proportion. Petitioners' speech scheme thus stands in sharp contrast to a system, akin to the one

in *Rosenberger*, in which the university funds a facility for the printing of leaflets or the creation of web pages that are equally available to all student groups.

Also unlike a normal public forum, here the petitioners have imposed a discrete, mandatory fee solely to promote a diversity of speech on campus. Creating speech is the only purpose of the state's program. In such circumstances, the use of the mandatory fee is all the more invasive of dissenting students' rights against compelled speech, because none of the fee goes toward other uses that might benefit them, as with the construction of a public facility or a communications network. Petitioners have not shown that the achievement of this goal is important enough to justify a fee that forces students to support speech with which they disagree. If the government intends to promote political and ideological speech, even if it does so in a content-neutral manner, it either should pay for it out of general revenues or, if it chooses to use a discrete fee, it should impose the fee only on those who agree with the speech. In the absence of any showing of a vital problem or need to create political speech, the First Amendment requires that the government promote speech in a manner that avoids the forced contributions of those who disagree. At the very least, this Court should make clear that if the government is going to fund speech for the sake of speech, it must do so in a content-neutral manner.

III. THE FIRST AMENDMENT'S ORIGINAL UNDERSTANDING SUPPORTS THE PROHIBITION ON THE USE OF MANDATORY FEES TO FUND POLITICAL SPEECH

The limited evidence that we have concerning the original understanding of the First Amendment supports the principle that the government cannot use mandatory fees

to support speech with which the payers disagree. Not only are the records of the drafting and ratification of the First Amendment sparse, but they also do not directly address the issue of compelled speech. Nonetheless, in examining these issues, this Court has long looked to the Virginia "Assessment Controversy" for guidance as to the intentions and beliefs of those who wrote the First Amendment. See, e.g., *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 74 (1947) (appendix to dissent of Rutledge, J.); *Abood*, 431 U.S. at 234 n.31; *Rosenberger*, 515 U.S. at 853 (Thomas, J., concurring); *id.* at 868 (Souter, J., dissenting). While the Assessment Controversy occurred five years before the ratification of the Bill of Rights, its involvement of many of the leading founders, in the most important state of the early republic, and its airing of many of the key arguments and issues, justifies its relevance for interpretation of the First Amendment. Close examination of the Assessment Controversy indicates that some of the leading framers would have understood the First Amendment to bar the imposition of discrete taxes to fund political or ideological speech.

In the 1786 Assessment Controversy, Thomas Jefferson, the author of the Declaration of Independence, and James Madison, the future father of the Constitution and the drafter of the Bill of Rights, successfully convinced the Virginia legislature to enact a statute guaranteeing religious freedom and to reject a tax assessment bill for the support of an established church. In light of Jefferson and Madison's involvement and the political importance of Virginia in the early years of the Republic, judges and scholars properly have considered the events of the Assessment Controversy to be an important piece of evidence in construing the First Amendment. See, e.g., Thomas Curry, The First Freedoms 134 (1986); Robert L. Cord, Separation of Church and State: Historical Fact and

Current Fiction 20-23 (1982); The Virginia Statute for Religious Freedoms: Its Evolution and Consequences in American History (Merrill D. Peterson & Robert C. Vaughn eds., 1988); Leonard Levy, The Establishment Clause 51-60 (1986); Leo Pfeffer, Church State and Freedom 104-14 (revised ed. 1967); Dumas Malone, Jefferson: The Virginian 274-85 (1948).

In brief, the Assessment Controversy had its roots in revolutionary Virginia's struggle over the proper relationship between church and state. Following the break with Great Britain, Thomas Jefferson led efforts to break the state's ties with the Anglican church, which was the established church of the colony. In 1779, Jefferson's Bill for Establishing Religious Freedom, which prohibited the state from compelling any citizen from attending or supporting religion and which guaranteed each individual's freedom to profess his own religious beliefs, was introduced in the state legislature but did not pass. 2 Papers of Thomas Jefferson 545 (Julian P. Boyd ed. 1950). That same year, other legislators proposed a bill providing for a general assessment to fund the operations of Christian churches throughout Virginia. After British operations in the state had ceased, the state legislature in 1784 turned to consideration of the proposed assessment. Assuming Jefferson's mantle, James Madison led the fight in the legislature against the assessment. In June, 1785, he issued his famous Memorial and Remonstrance Against Religious Assessments as part of a successful strategy that defeated the tax. 8 Papers of James Madison 298-306 Robert A. Rutland ed. Once Madison had organized a groundswell of popular opposition to the assessment, the legislature tabled it and instead enacted Jefferson's Statute for Religious Freedom, which ended efforts in Virginia to impose a mandatory fee for the support of an established church.

In *Abood*, this Court correctly recognized that the roots of the Assessment Controversy concerned not just religion, but the larger issues of freedom of speech and of thought. At the time of the framing, organized religion was one of the primary means whereby the state engaged in speech, and, in the absence of modern ideologies and permanent political parties, religion was one of the few organized systems of thought. To Jefferson and Madison, however, religious belief—like political and ideological belief—ought to be the product of the workings of the rational mind, not the command of the state. The same intellectual freedom from state-imposed orthodoxy allowed the individual citizen to develop and maintain both religious and political beliefs. Religious freedom thus became intertwined with freedom of thought, of conscience, and of speech, a development that recent cases have recognized in prohibiting the state from discriminating against religious speech. *See, e.g., Rosenberger*, 515 U.S. at 830-37; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393 (1993).

Jefferson's Statute for Religious Freedom provided the philosophical and political justification not just for the idea of religious toleration, but for the broader right of the individual to intellectual liberty. Protecting religious liberty was simply one component of the protections for political and ideological liberty and speech. "Our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry." 2 Papers of Jefferson at 545-46. Jefferson wrote that religion had to be independent of the state because "the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds," and that "all attempts to influence [the mind] by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hyprocrisy and meanness." 2 *id.* at 545. As

Madison wrote in his Remonstrance, "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." 8 Madison Papers at 298. Madison believed this right to be "inalienable" because "the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men." *Id.* The human mind, Jefferson and Madison believed, must remain free from the power of the state. Declared Jefferson's bill: "the opinions of men are not the object of civil government, nor under its jurisdiction." 2 Papers of Jefferson at 546.

If the state is barred from influencing the opinions of its citizens, Jefferson and Madison concluded, it should also be prohibited from imposing a specific tax for the support of speech designed to propagate certain beliefs. In the course of defending the freedom of the human mind, Jefferson's bill declared "[t]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." 2 *id.* at 545. Mandatory fees violated the individual's freedom of thought, even if some of the funds supported speech with which an individual agreed, because they deprived the citizen of the freedom to choose which speech to support. Even if it were only forcing the citizen to contribute to a "teacher of his own religious persuasion," the bill declared, the government still violates the citizen's rights because it "is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness." *Id.* Jefferson and Madison feared that any government interference at all in the area of speech would distort what we today call the marketplace of ideas: "truth is great and will prevail if left to herself; that she is the

proper and sufficient antagonist to errour, and has nothing to fear from the conflict, unless by human interposition, disarmed of her natural weapons, free argument and debate." 2 *Id.* at 546. Civil government should interfere not with what people believe and say, but when "principles break out into overt acts against peace and good order." *Id.* In the end, these arguments carried the day and convinced Virginia's legislature to reject the assessment in favor of Jefferson's declaration of religious freedom.

Efforts by founders such as Jefferson and Madison to dis-establish the Anglican church represented a broader belief that the state should not be in the business of shaping a citizen's mind and views. To be sure, other states in the revolutionary and critical periods maintained established churches, and we cannot definitively conclude that all of the framers who voted for the First Amendment in Congress and the state ratifying conventions believed it to codify the lessons of the Virginia experience. Nonetheless, this Court has and should take the Assessment Con troversy as a guide to the understandings of two of the principle motivating minds behind the Declaration of Independence, the Constitution of 1787, and of the Bill of Rights concerning the concepts of freedom of religion, freedom of speech, and freedom of thought. Jefferson and Madison believed that these rights prohibited the state from imposing a mandatory fee on its citizens to be used to fund political or ideological speech with which they disagreed. As such, their views lend important support from the framing for the same principle in this Court's case law.

Indeed, the facts of this case underscore the interrelated purposes of the religion and speech clauses of the First Amendment. Out of their religious convictions, respond-

ent students do not wish to support the political speech disseminated by some student groups. Respondent students' religious views give rise to certain political and ideological views; political and ideological speech can offend an individual's religious as well as his or her political beliefs. Petitioners' funding, therefore, of political and ideological views that offend respondents, using respondents' own money, violates both their freedom of religion and their freedom of speech, both of which are essential components of the freedom of thought at the core of the First Amendment.

Any asserted public forum justification would not have altered this application of Jefferson and Madison's views. Both Jefferson and Madison opposed the general assessment, even though it would have benefited all Christian churches, rather than only the Anglican church. A broader funding scheme did not alleviate the violation of individual rights that arose from compulsory fees to pay for views with which the payers disagreed. Jefferson and Madison would not have believed the violation of the dissenting students' rights to be cured if the state took a portion of the money and provided it to student groups whose views the students shared, just as Jefferson and Madison would not have thought the general assessment to have been constitutional if Virginia had distributed the tax dollars to each Christian sect. To them, the constitutional violation would have occurred when the state coerced any citizen to provide a single dollar to support views with which he or she disagreed. Where, as here, this is what the government has done, the original understanding of the First Amendment suggests that this Court must invalidate the mandatory payments.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

RENEE GIACHINO *
NATIONAL SMOKERS ALLIANCE
901 N. Washington St.
Suite 400
Alexandria, VA 22314
(703) 739-1324

JOHN YOO
BOALT HALL SCHOOL OF LAW
University of California
Berkeley, CA 94720
(510) 643-5089
Institutional Affiliation for Identification Purposes Only

* *Counsel of Record*

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IN THE

Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *et al.*,

Petitioners,

—v.—

SCOTT HAROLD SOUTHWORTH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER CAMPUS CENTER AT UW-MADISON, FORTY-NINE OTHER STUDENT GROUPS, THE NATIONAL CONSORTIUM OF DIRECTORS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER RESOURCES IN HIGHER EDUCATION, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

*Patricia M. Logue
Ruth E. Harlow
LAMBDA LEGAL DEFENSE
& EDUCATION FUND, INC.
11 East Adams Street, Suite 1008
Chicago, Illinois 60603
(312) 663-4413

Attorneys for *Amici Curiae*

* *Counsel of Record*

QUESTION PRESENTED

Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.

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INTERESTS OF THE *AMICI CURIAE*[1]

The *Amici Curiae* file this brief in support of Petitioners. *Amici* participate in this case because the decision below, unless reversed, will seriously harm the extracurricular "marketplace of ideas" and the array of student support services that the University of Wisconsin at Madison ("University" or "UW") provides and deems essential to its educational goals. Similar programs now in place at most other public universities will also be undermined. And in the process, the role of innovative, small, or controversial student groups on campus will diminish most severely, to the detriment of all students.

Fifty student groups from public and private colleges and universities around the country join this brief, including the Lesbian, Gay, Bisexual and Transgender Campus Center ("LGBT Campus Center"), which is a Registered Student Organization at the University and one of the 18 groups whose funding through mandatory fees plaintiffs oppose. The LGBT Campus Center provides educational programs and individual support services, including peer counseling and referrals to other resources; maintains a library and a research collection of documents; and works to ensure a "pluralistic university environment that includes lesbians, gays, and bisexuals." R34, Att. B. It also fosters communication among students (including through a newsletter), works for positive relations among student groups, and serves as a "safe space utilizable by all." R34, Att. B. The LGBT Campus Center has received support from the General Student Services Fund and an events grant from the Associated Students of Madison. The

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[1]Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for either party, and no one other than *Amici* and their counsel has made any monetary contribution to its preparation.

remaining student group *amici* are listed in the Appendix.

The National Consortium of Directors of Lesbian, Gay, Bisexual, and Transgender Resources in Higher Education is a professional organization that includes the directors of over 50 campus centers that address issues and provide services related to sexual orientation. Many of the centers receive funding through mandatory student fee systems at their schools.

Lambda Legal Defense and Education Fund ("Lambda") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS. Lambda appears here to urge that appropriate First Amendment standards govern this dispute; to help ensure that the full range of views about sexual orientation and related issues continues to be aired vigorously at the University and other campuses; and to help ensure that services important to lesbians and gay men continue to remain available, among the many services that public universities offer for the welfare of their students.

SUMMARY OF ARGUMENT

Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech depends upon the structure and nature of the policy or program. Here, the University uses a mandatory student fee to fund two viewpoint-neutral grant programs for diverse organizations: the Associated Students of Madison (ASM) grant program, which encourages a full spectrum of expressive and associational activity by the University's Registered Student Organizations (RSOs); and the General Student Services Fund (GSSF), which supports groups that provide direct services to students and thereby advance student health, safety, and academic success. Both the ASM and the GSSF programs serve vital University needs

and are structured to respect the First Amendment, not to offend it.

This brief considers each of those two programs separately. Because plaintiffs' claims present a new kind of compelled subsidy case, the Court should analyze each program by returning to the fundamental questions it examined in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the first case of its kind. There, the Court looked at whether the plaintiffs had a cognizable First Amendment injury; if so, whether the government had weighty enough interests to justify that injury under a balancing test; and, finally, whether any continuing safeguards were necessary to preserve the constitutional balance. The "germaneness" safeguard, however, which the Court developed to achieve and maintain a constitutional balance in compelled subsidy cases involving single, representative organizations, has no place in the present context of University grant programs.

When the plaintiffs and all other students must help pay for the University's ASM and GSSF programs, they do not suffer any constitutional injury, even if they object to the expression or beliefs of some groups eventually supported by those University funding streams. The mandatory student fees fund a viewpoint-neutral, limited public forum for RSO expression and a viewpoint-neutral, multi-faceted student services program, not specific organizations and their ideologies. Plaintiffs can no more devise a cognizable First Amendment injury here than they could if they objected to an individual professor's political views, indirectly supported through their tuition payments, or if they objected to controversial procedures or information offered by private healthcare professionals, indirectly supported through the discrete part of the mandatory fee that funds healthcare at UW.

Moreover, even if plaintiffs had significant First Amendment interests at stake, the University's compelling

needs to generate robust extracurricular debate and to provide a safe, supportive environment for learning through various student services would justify the mandatory fees challenged here. The University has crafted necessary but well-bounded grant programs to serve its core interests. The ASM and GSSF programs, including their financial support of some organizations that engage in political and ideological speech, should prevail in the constitutional balance and be left intact.

ARGUMENT

I. THIS COURT SHOULD USE THE SAME THREE-PART PROCESS OF CONSTITUTIONAL ANALYSIS FOR PLAINTIFFS' COMPELLED SUBSIDY CLAIMS AS THE COURT BEGAN WITH IN *ABOOD*, BUT THE MUCH DIFFERENT FACTUAL CONTEXT HERE DICTATES THAT THE PARTICULARS OF THAT ANALYSIS SHOULD DIVERGE FROM THE PRIOR UNION AND BAR CASES.

Beginning with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and continuing through *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997), this Court has decided a number of cases raising the claim that compelled financial contributions to a **single private entity** that advances **common** interests — but also engages in expressive activity with which some contributors disagree — violates the First Amendment. To assess whether the plaintiffs in *Abood* had a valid claim, the Court examined three issues. First, is there a cognizable First Amendment interest or injury at stake? *See* 431 U.S. at 222, 229-35. If so, then second, does the government have sufficiently weighty reasons to justify, on balance, some or all of the infringement on plaintiffs' interests? *Id.* at 229, 232-37. Third, are there any continuing limitations or safeguards necessary to preserve the constitutional balance? *Id.* at 235-42. This is the analytic framework that the Court should return to in this case, but the

vastly different setting and different type of compelled payments at issue lead to much different answers than in the prior cases.

Abood and its progeny, firmly grounding their analysis in the factual background at hand, where the single supported entity was most commonly an "agency shop" union, devised a "germaneness" test and an expense-by-expense application of that test to preserve the constitutional equilibrium between serving government interests and minimizing First Amendment harms:

> [I]n *Abood* ..., we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435, 447 (1984). *See also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310-11 (1986); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 519 (1991). In light of the "substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other," the Court likewise found that a state could constitutionally require contributions to a unified bar association. *Keller v. State Bar of California*, 496 U.S. 1, 12, 13-14 (1990). The germaneness standard, and internal procedures to enforce that line between the entity's permitted and forbidden expenditures of objectors' fees, were again necessary, however, to maintain the constitutional balance in the bar context. 496 U.S. at 14-17.

Abood, Keller, and later cases developed the ultimate germaneness benchmark, and its accompanying procedures, to provide the ongoing constitutional limits that are appropriate when the state designates a single, representative organization to make common cause for many and requires all covered individuals to subsidize that entity.

Here, plaintiffs present a substantially different type of compelled subsidy claim. The plaintiff students are required to subsidize **state programs** that in turn fund **many organizations** to provoke **diverse** expression, an array of student services, and varied learning-by-doing at a public university. This case does not involve the same injury, same government interests, or same need for continuing safeguards as do the union and bar collective representation cases. *See infra* at 11-22, 25-30.

Thus, the court of appeals erred in beginning at the end point of the nuanced constitutional balance struck in the single-entity cases and in applying it to this distinct context. *See* 151 F.3d at 724 (adopting *Lehnert*'s formulation of the germaneness analysis as the test for this case). Instead, this Court should ask the fundamental constitutional questions appropriate for this first-of-its-kind compelled subsidy case, the same three questions that the Court had to consider in *Abood*. And as the *Abood* line of cases did, the Court should answer those questions based upon a careful grounding in the factual background of this university-centered dispute and the multi-organization funding programs at issue.

The court of appeals similarly erred in its legal analysis by proceeding as if a sole, artificially simplified university policy were at issue here, a policy that required all students to directly "fund private organizations which engage in political and ideological activities, speech and advocacy." 151 F.3d at 722. Plaintiffs' challenge to the University's mandatory fee and the school's eventual support of eighteen particular

organizations, however, implicates three different University funding mechanisms (and no direct compelled contributions to any private group). This Court should separately assess each state funding program, its purposes and parameters, to ensure that this case constitutionally tests the real contributions to University programs that plaintiffs are compelled to make.[2]

II. A PUBLIC UNIVERSITY DOES NOT VIOLATE THE FIRST AMENDMENT WHEN IT REQUIRES ALL STUDENTS TO HELP PAY FOR A VIEWPOINT-NEUTRAL, LIMITED PUBLIC FORUM DESIGNED TO FOSTER DIVERSE SPEECH AND ASSOCIATIONAL ACTIVITY AMONG STUDENTS.

The University of Wisconsin, like virtually all universities, strongly encourages the associational and expressive activities of a full spectrum of student organizations in order to provide a "second curriculum" that supplements classroom teaching. Stipulation of Facts ("Stip.") ¶ 25, Att. H. As this Court has recognized, "universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995). Moreover, the range, "quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment." *Id.* Nor is it overstatement to emphasize that "[t]he Nation's future depends upon leaders trained [at universities] through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967). Registered Student

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[2]This brief does not address whether the funding mechanism that allows a portion of the mandatory fee to be allocated by student referendum comports with the First Amendment. Only one of the organizations with which plaintiffs disagree, WISPIRG, receives its funding through that process.

Organizations at UW help fill this need for multiple perspectives, vigorous debate, and "the search for truth," defined by statute as the basic purpose of the state university system. Wis. Stat. § 36.01(2).

A. Mandatory Financial Support Of The ASM Grant Program Does Not Cause Constitutional Injury To The Plaintiffs.

1. With The ASM Portion Of The Mandatory Fee, UW Students Fund A Viewpoint-Neutral Limited Public Forum For Registered Student Organizations.

To foment student group activity, the University has established a funding stream available only to RSOs and administered by the Associated Students of Madison.[3] As explained below, the ASM grant program mirrors the Student Activities Fund (SAF) the Court had before it in *Rosenberger* and is a limited public forum.

A state creates a public forum when it has opened its property "for use by the public as a place for expressive activity." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). The forum "may be created for a limited purpose such as use by certain groups, *e.g. Widmar v. Vincent* [454 U.S. 263 (1981)] (student groups), or for the discussion of certain subjects. . . ." 460 U.S. at 46 n.7. And the government property that the state makes available for expressive activity may be money, rather

[3]The University has charged a separate student fee, along with tuition, since the 1800s. The ASM and GSSF portions of the fee challenged here came about after a study revealed that the University did not have a similar range of services and activities, "such as debate teams, concert performances, guest lecture series" and other expressive presentations, as most universities; the University acted to repair that deficit. *See* R26, Att. A at 1733.

than physical space. *See Rosenberger*, 515 U.S. at 830 (the University of Virginia's "SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable"). The essence of a limited public forum is equal access for all eligible speakers, regardless of the content or viewpoint of their speech, once the parameters for that channel of communication have been set.[4]

ASM grants are "major funding sources" for student organizations, Stip. ¶ 25, Att. H, chart at 41-42, and are the most common way those groups receive University financial support. Each semester four to five dollars of each student's mandatory fee pays for this grant program. *See* Stip. ¶¶ 5-6.

To qualify as an RSO and thus be eligible for ASM support, a group must (1) be a not-for-profit, formalized organization, (2) be controlled and directed by students, (3) be composed mainly of students, (4) relate to student life on campus, (5) abide by all non-discrimination laws and policies, and (6) abide by all the financial and other regulations contained in the Student Organization Handbook. Stip. ¶ 25, Att. H at 1. "Recognizing that student organizations play a significant role in the education of UW-Madison students," the ASM program gives operations grants "to support the ongoing needs of" RSOs. Stip. ¶ 25, Att. H at 39. It also awards event grants, which can only fund RSO events that are on or near the campus in Madison and open to all students. Stip. ¶ 25, Att. H, chart at 41-42. Finally, RSOs can receive small ASM travel grants, if the travel is "central to the purpose" of the organization. Stip. ¶ 25, Att. H at 39. None of the ASM

[4]*See Rosenberger*, 515 U.S. at 829 ("[o]nce it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set"; it may not "discriminate against speech on the basis of its viewpoint"); *Perry Education Association*, 460 U.S. at 46 (although state not required to indefinitely retain the open forum it has designated, "as long as it does so it is bound by the same standards as apply in a traditional public forum").

allocations can be used for politically partisan events or activities. Stip. ¶ 25, Att. H, chart at 41-42; J.A. 252.

Within these general parameters, ASM grants are provided on a viewpoint-neutral basis. Stip. ¶ 12. Very few applications are unsuccessful. *See* J.A. 138-52 (only six out of 189 requests did not receive support). During the 1995-96 school year, the ASM subsidies enabled many groups to show films, to bring theatrical or cultural events to campus, and to sponsor prominent guest speakers. *Id.* ASM event grants underwrote the Federalist Society's debates on affirmative action and tort reform, another group's foreign affairs forum, and a presentation on human rights in Tibet. *Id.* Operations grants paid for items such as printing, postage, equipment rental, subscriptions and advertising to enable 126 RSOs to pursue their associational and expressive goals, including 40 "last minute" grants that particularly help "newly formed organizations," Stip. ¶ 25, Att. H at 39. The RSOs that took advantage of ASM funding ranged from the International Socialist Organization to the Wildlife Ecology Club, the Business and Tax Law Association to the Filipino-American Student Organization. J.A. 138-52.

No cash goes to any of the supported groups. Stip. ¶ 21. After a grant is made, covered expenses are paid out of the state treasury directly to creditors through an invoice and requisition process that the Office of the Dean of Students oversees. *Id.*; J.A. 244-52.

As in *Rosenberger*, the University's ASM grant program "expends funds to encourage a diversity of views from" student organizations, 515 U.S. at 834, and creates a monetary limited public forum. *See* 515 U.S. at 829-30. The ASM funding scheme matches the SAF in *Rosenberger* in all material respects and there is no dispute in this case that forum

principles apply.[5] It is the University's requirement that all students help pay for the ASM viewpoint-neutral forum, even if they disagree with political or ideological ideas expressed by participants, that must be assessed here.

2. Because Their Student Fees Fund The University Forum, And Not Individual Private Groups, Plaintiffs Do Not Suffer A Cognizable First Amendment Injury.

Contrary to plaintiffs' arguments and the decisions below, the ASM grant program does not implicate plaintiffs' First Amendment interests in the same way that the union fees in *Abood* — or other forced payments to a single representative body — affected dissenters. In the earlier compelled subsidy cases, the forced link to a union or bar association impinged dissenters' associational freedoms, *see Abood*, 431 U.S. at 225, and also implicated "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 117 S. Ct. at 2139. With the ASM funding they challenge, plaintiffs are not required to align themselves with the efforts of any representative entity, nor are they compelled to contribute to a private organization and its particular viewpoint.

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[5]Indeed, the plaintiffs themselves have proceeded in this litigation as if the whole allocable portion of the segregated fee, or at least the collective funding streams challenged here, created one forum and have conceded that the existence of a limited public forum can be taken as a premise in assessing all of their claims. *See* Appellees' Br., No. 97-1001 at 26 ("[t]he students do not dispute that the University has created a public forum of funding for student groups"). They should be held to that concession for both the ASM and GSSF grant programs, and other briefs before the Court take that premise as a starting point. *Amici* in this brief, however, provide the Court with a separate factual and legal analysis of each program, because each can stand on its own, distinct merits.

Rather, plaintiffs pay a charge to the University to fund its limited public forum. They are helping the University construct a stage for diverse free expression. Paying this fee to the state, which then uses it for a viewpoint-neutral program to underwrite the expenses of all kinds of student groups, "cannot [rightly] be said to engender any crisis of conscience" among plaintiffs or other students. *See Glickman*, 117 S. Ct. at 2139. It is only by discounting the structure and neutral nature of the ASM forum, and proceeding as if they must directly fund isolated participants in the forum whose speech they find objectionable, that plaintiffs conjure First Amendment injury.

As several judges of the Seventh Circuit emphasized, the "chain of custody" of funds "cannot be enough to raise a constitutional issue." 157 F.3d at 1126 (Rovner, J., dissenting from denial of rehearing *en banc*). Although a tiny fraction of plaintiffs' fees could be traced to state treasury disbursements for individual organizations' costs, all mandatory fee payments made to the University that, in turn, the ASM allocates to more than 100 groups, were collected by the school to support First Amendment activity in general, across the full spectrum of views. *Id.* Contributing to this monetary forum for speech from a multitude of orators does not implicate plaintiffs' freedom of belief, any more than special fees or tuition payments used to build a physical forum, such as a school auditorium or meeting room, would. Likewise, students cannot invoke the First Amendment to challenge portions of their tuition supporting professors' views with which they disagree, because they are being forced to pay for the whole faculty — not any one professor's speech. *Cf. Libertarian Party of Indiana v. Packard*, 741 F.2d 981, 989-90 (7th Cir. 1984) (no First Amendment rights implicated where state license plate assessment ultimately funds political party activity; motorists' money is "going 'to facilitate and enlarge public discussion and participation in the electoral process'").

That plaintiffs' beliefs are deep-seated, or that the forum includes political and ideological expression, does not change the analysis and give plaintiffs a cognizable First Amendment interest here. Those deep-seated beliefs remain intact. The Seventh Circuit never examined plaintiffs' alleged injury in light of the true, viewpoint-neutral nature of the ASM portion of the fee, and erred in relying on single entity cases to find a "'particularly great'" First Amendment burden here. 151 F.3d at 729 (quoting *Lehnert*, 500 U.S. at 522). While the depth of an individual's beliefs together with compelled direct support for an advocacy organization with contrary political views might create an especially significant infringement on First Amendment interests, *see Lehnert*, 500 U.S. at 521-23 (non-majority part of opinion),[6] those considerations are not even arguably at play where an individual is merely contributing to a state program that does not have a particular stance on any issue.

The complete lack of First Amendment injury should end plaintiffs' claim that their forced subsidy of ASM grants is unconstitutional.

B. Even If The Objecting Students Had Significant First Amendment Interests At Stake, The University's Core Need To Encourage Diverse Student Group Expression, Including Political And Ideological Expression, Through A Funding Forum Would Outweigh Those Individual Interests.

Could plaintiffs find some First Amendment interest at stake in their contribution to the University's limited public forum, for all the reasons and given all the facts summarized

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[6] *But cf. Abood*, 431 U.S. at 232 ("Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry.").

above, that interest would have to be quite small.[7] If a cognizable injury from the compelled subsidy of speech is found, *Abood* shows that the governing constitutional test should be a balancing one. *See* 431 U.S. at 229; *see also id.* at 225. The Court has never used strict scrutiny in a forced financial subsidy case, as plaintiffs sought below, nor have the lower courts. *See Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032, 1037-38 & n.4 (9th Cir. 1999); *Carroll v. Blinken*, 957 F.2d 991, 999 (2nd Cir. 1992) ("*Carroll I*"), *cert. denied*, 506 U.S. 906 (1992). In addition, the specialized "germaneness" benchmark evolved — after an initial balancing inquiry — for the distinct, single-representative-entity context, and as explained further below, is incompatible with the state grant programs for diverse groups that are now before the Court. On balance, any minimal injury that plaintiffs might suffer from helping pay for the ASM program would easily be justified by the University's strong interests here.[8]

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[7]It is important to review the injuries that plaintiffs admittedly do not suffer here. They are not being compelled to speak or to associate with any organization. They admit that the fee does not create "the false impression that the objectionable groups are speaking for the plaintiffs." R42 (Plaintiffs' Reply Br.) at 2. The only *asserted* injury in this case is that plaintiffs are forced to financially support "groups they would not support voluntarily because they contradict the plaintiffs' personal religious and ideological views." *Id.* Thus, at most "First Amendment interests" are implicated here, not any wholesale assault on a fundamental right. *See generally Glickman*, 117 S. Ct. at 2139.

[8]*See Kania v. Fordham*, 702 F.2d 475, 477 n.3, 480 (4th Cir. 1983) (in case involving mandatory student funding of campus newspaper, stressing that the "extent of the abridgement is properly considered in striking the constitutional balance between the educational goals of a state university and the speech and association rights of its students" and holding that "the minimal and indirect restriction on Kania's" rights from the mandatory fee was constitutional).

Compelled student funding of newspapers — without any opt out

Amici will go on to show, however, that even if plaintiffs' First Amendment interests were as substantial as the Seventh Circuit found them to be, the University's compelling justification for this forum would still outweigh plaintiffs' objections to funding it.

1. Varied Student Group Activity Lies At The Heart Of A Public University's Mission; A Viewpoint-Neutral Funding Forum Allows All Kinds Of Groups, Including Small Or Controversial Ones, To Be Strong Participants In University Life.

Student groups' First Amendment activity and "creative inquiry" on university campuses constitutes "one of the vital centers for the Nation's intellectual life." *Rosenberger*, 515 U.S. at 836. It is the very "'business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.'" *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); Wis. Stat. § 36.01(2). As UW has recognized and emphasized in this case, the robust debate engendered by wide-ranging student group expression is crucial to its educational mission and to its role in the larger society. *See* Brief for Petitioners.[9]

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mechanism — has routinely been upheld, although those vehicles for "increas[ing] the overall exchange of information, ideas, and opinions on the campus[,]" unlike the limited public forum here, are not truly viewpoint-neutral. *See Kania*, 702 F.2d at 480, 477 n.5; *see also Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993).

[9]As the Second Circuit wrote in *Carroll I*, 957 F.2d at 1001,

> A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society. Were it

The viewpoint-neutral ASM forum directly and substantially advances the University's strong interest in vibrant student group expression. This University, like most other institutions of higher learning, has determined that funding assistance is necessary to generate the diverse range of organizational activity and speech that makes up a functioning extracurricular "marketplace of ideas." *See* J.A. 178 ¶ 2. By offering equal access to the ASM grants for all RSOs, the University gives even new, small, or "fringe" groups the financial ability to find members, sponsor events, test ideas, and be heard by large numbers of other students.[10] Those more novel or controversial participants in campus life provide an essential part of all students' education, even if — and, in part, because — some students become convinced that the ideas expressed are wrong. "To endure the speech of false ideas . . . and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

Given its aims, the University of course allows political and ideological speech within the forum. Robust political debate, on the structure of government, the meaning of the Constitution, the appropriate content of laws, civil rights issues, and many more political questions, must be heard if the ASM forum is to serve its vital educational purpose. And without the financial assistance made available to all RSOs, the level of political debate and the spectrum of voices heard

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otherwise, college would be a very quiet, intellectually diminished and ultimately irrelevant place.

[10]Public fora like the ASM program "even the playing field" somewhat for all speakers who fall within the definition of the forum. Any group can take the stage and project its message, whereas outside the forum its ability to communicate may be hampered by its small size or lack of popularity and attendant constraints on fundraising.

at the University would greatly diminish. Rather than showing any injury to plaintiffs' interests, *see supra*, the political demonstrations, reactions to legislative proposals, opposition to the death penalty and even to capitalism generated by RSOs that receive ASM support show that the funding forum is working to accomplish the University's core mission.[11]

Because the Seventh Circuit erroneously looked at this case through the lens of a single-entity compelled subsidy dispute, it failed to comprehend the University's overwhelming interest in this viewpoint-neutral funding forum. The court of appeals pointed to "the importance of a common cause for justifying the compelled funding" and found pivotal that "there is no common cause between private organizations which engage in political and ideological speech and the objecting students." 151 F.3d at 727-28. That false approach ignored that the University's great interest here is in diversity and dissent, not common cause.

Likewise, the courts below essentially concluded that "political and ideological" expression could meaningfully be distinguished from educational expression, and that political or ideological groups were less worthy participants in the University forum. *See, e.g.*, 151 F.3d at 725 ("the International Socialist Organization is only incidentally concerned with education. Its primary goal is the promotion of its ideological beliefs. The fact that some educational benefit may come from it is secondary, and therefore not sufficiently germane to overcome the objecting students'

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[11]*See Sweezy*, 354 U.S. at 251 ("History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society [or in a university]").

constitutional rights."). That conclusion flies in the face of what the ASM funding forum is all about — giving voice to groups with all kinds of strong ideologies and political beliefs to **thereby** provide an essential component of a university education. No participant or perspective in such a viewpoint-neutral forum can be viewed as less "germane" or educational than another, for different speech will enlighten different students and the most obscure or tangential comment may spark inspiration or reveal truth.

2. The ASM Grant Program Is Carefully Structured To Serve The University's Vital Interests.

While equal access and freedom of expression are the necessary touchstones within the ASM forum, the University has carefully defined the boundaries of its funding program. This is a limited public forum open only to RSOs, which must be composed mainly of students and be student controlled, among numerous other requirements. *See supra* at 9. In addition, electioneering and other partisan political activities are outside the scope of the forum for all groups. *See* Stip. ¶ 25, Att. H, chart at 41-42; J.A. 252. The University has made the judgment, similar to boundaries set at other schools, that this one category of political activity — with its inherent focus on individual, non-student political candidates — should not be included within its funding program.

Some funded RSOs address issues in the state legislature (which meets a few blocks away from campus), hold off-campus events, or travel to conferences, but those activities do not change the very University-focused nature of the ASM forum. The Ten Percent Society, for example, contributes to the extracurricular marketplace of ideas exactly as the University intends when it communicates to other students, through its Internet home page, that it favors legislation allowing same-sex marriage and condemns the Wisconsin

Legislature for banning such unions. *See* 151 F.3d at 721.[12] ASM-funded events must be near the campus if they are outside its physical boundaries and must be open to all students. Similarly, the few travel grants paid for by the forum must be central to an RSO's purpose, and therefore those trips will significantly enrich the group's associational and expressive activity back at UW. *See supra* at 9-10.

Mandatory, rather than voluntary, funding is necessary (1) to guarantee that the ASM account has enough money to accomplish its educational purposes and (2) to spread the cost of this "second curriculum" among all the students who benefit from it — every student at UW. If paying the ASM portion of the mandatory fee were optional, significantly less money would fund the ASM forum, as those who objected to the forum as a whole, disagreed with the speech of particular groups, or felt the need to save money withheld payment. If the University raised the ASM portion of the fee to compensate for the loss of some student funders, more would likely opt out as the financial burden rose. With any voluntary system, the students willing to support the ASM forum would be paying for an essential aspect of others' education and carrying them as free riders. The myriad student groups that the ASM program encourages, their expression and events that come to the attention of all students, and the competing ideas that they engender, greatly benefit every young person who comes to UW for an education, even if particular students decline to join any RSO and are affronted by speech in the

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[12]Contrary to the court of appeals' portrayal, however, this specific communication (like many others objected to by plaintiffs) was not paid for with ASM (or GSSF) grant funds. The Ten Percent Society received an ASM operations grant for other, general expenses. J.A. 181, ¶ 34. None of the RSOs hire professional lobbyists. *Cf. Carroll v. Blinken*, 42 F.3d 122, 127 (2nd Cir. 1994) ("*Carroll II*") ("professional lobbying efforts . . . 'stretch[] the nexus between the extracted fee and SUNY Albany's educational interests too far'").

forum. *See supra* at 15-18.[13] Just as every student must pay for tuition, every student appropriately pays for the vibrant extracurricular marketplace at the University. *See Keller*, 496 U.S. at 12.

3. No Additional Safeguards Are Necessary To Preserve The Constitutional Balance.

The decisions below not only erred in finding a constitutional violation, but also in their use of the single private entity cases as a reference point for crafting a remedy. *See* 151 F.3d at 733 & n.16 (imposing on University the ongoing procedural requirements of *Chicago Teachers Union v. Hudson*, including the need to give any objectors "a reasonably prompt decision by an impartial decision maker concerning the propriety of" expenses paid by mandatory fees). Those unnecessary "remedial" efforts ignored the essential differences between a private, politically active entity collecting fees to advance its policy positions, on the one hand, and a state University collecting fees to fund a limited public forum for student groups, on the other. The differences bear emphasis again here, because they underscore that, in response to the second and third *Abood* questions, there are no additional limitations or procedures that should be grafted on to the basic, state-established parameters of this forum.

When the government charges a fee and sets up a

[13]This is a different "free rider" argument than the one the court of appeals rejected. The fact that all RSOs must open their doors to all students does not create the only significant free rider problem here. *Cf.* 151 F.3d at 728. Whether or not a student participates in any RSO, or in one of the large number that receive support through ASM grants, he or she benefits from the presence and speech of this whole array of groups that combine to form a challenging, stimulating University community. That free ridership is also "calculated" and not "incidental," *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part), for the University must strive to educate all its students.

viewpoint-neutral funding program for a certain category of private speakers, it does not share the self-interested perspective of any of those individual actors; instead, it is beholden to the broader public interest and the Constitution. Especially where the state has created a limited public forum, the First Amendment imposes a clear, continuing obligation to respect the parameters of the forum and to avoid viewpoint discrimination. *See supra* at 9 & n.4. Thus, without any additional mandate or procedure, funders of the forum are strongly protected against a viewpoint-biased, partisan misuse of their contributions. In contrast, when a union collects a mandatory fee, that single private organization has a clear self-interest in maximizing the fee and using it for its full range of advocacy efforts; in such circumstances, the ongoing germaneness standard and elaborate procedures to enforce it must be judicially required of the union. Neutral government programs for diverse organizations are manifestly different.

Indeed, if expressive organizations satisfy a forum's own limitations on permitted speakers and topics, they cannot constitutionally be subjected to further judgments about germaneness. Once the doors of a limited public forum swing open, all speech within its boundaries — no matter how "esoteric" or "ideological" — must stand on an equal footing. *See Rosenberger*, 515 U.S. at 829-30 (viewpoint discrimination, and content discrimination that goes beyond setting bounds of the forum, are impermissible). Furthermore, any system of individualized fee opt-outs and challenges, based on disagreement with particular expression, would threaten to introduce impermissible viewpoint discrimination into a monetary forum's grant process by making more money available for non-controversial groups and less for controversial ones.[14] If the elaborate protections and

[14]Plaintiffs have alternatively suggested that instead of an opt-out, all students should be asked to opt-in and individually designate the groups

procedural requirements in the union cases were carried over to this University setting, with its over 40,000 students and over 600 RSOs, the costs of those procedures alone would greatly diminish the size and vibrancy of the forum. *See* 157 F.3d at 1129 (Wood, J., dissenting from denial of rehearing *en banc*).

For all of these reasons, the ongoing safeguards used in single-entity compelled subsidy cases cannot be, and need not be, imported into the new context now before the Court.

III. A PUBLIC UNIVERSITY DOES NOT VIOLATE THE FIRST AMENDMENT WHEN IT REQUIRES ALL STUDENTS TO HELP PAY FOR A PROGRAM THAT FUNDS VARIED STUDENT SERVICES TO ADVANCE HEALTH, SAFETY AND ACADEMIC SUCCESS.

The General Student Services Fund (GSSF) underwrites critical support services that enable the large, diverse student body at UW to focus on learning. Though this grant program's emphasis is on practical needs, while the ASM program emphasizes robust extracurricular debate, the two are equally important, complement one another, and share many characteristics that lead to the same conclusion about their constitutionality. Like mandatory contributions to the ASM forum, mandatory contributions to the viewpoint-neutral, wide-ranging GSSF grant program do not impose a cognizable injury on objecting students; even if there were harm to First Amendment interests, as plaintiffs assert, the University's

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that are to receive University support through their mandatory fee, as with the Combined Federal Campaign. Such a scheme would obliterate the public forum aspect of the current funding program, set up to give voice to a wide range of substantive speech (not to facilitate fundraising, like the Combined Federal Campaign), and transform the RSO subsidies into a wholly viewpoint-based popularity contest.

needs prevail in the *Abood* balance; and the GSSF program should remain intact, without any new limitations or safeguards.

A. Mandatory Financial Support Of The GSSF Grant Program Does Not Cause Constitutional Injury To The Plaintiffs.

1. With The GSSF Portion Of The Mandatory Fee, UW Students Fund A Viewpoint-Neutral, Multi-Faceted Student Services Program.

The GSSF program gives many organizations the financial ability to "provide direct, ongoing services to significant numbers of UW-Madison students;" the funded services are ones that "contribute significantly to student health, safety, or academic success." Stip. ¶ 13, J.A. 236. GSSF grants will be made only if other sources of sufficient funds are not available to underwrite the student service a group provides. The Student Services Finance Committee (SSFC), which allocates GSSF monies, "expects groups to continually search for other available funding." J.A. 236.

Most of the organizations that receive GSSF grants are RSOs. *See* Stip. ¶ 17; J.A. 178, ¶ 3. University departments and community-based service organizations are also eligible, provided they meet all of the requirements and conditions for funding. J.A. 237. In addition to the criteria related to purpose and other sources of funding discussed above, the organization must keep and make available detailed financial records, records measuring the number of students served, and client evaluations. J.A. 238. Any organization that is primarily political is ineligible to receive a student services grant. *Id.*

GSSF grant recipients are encouraged to use student volunteers, in addition to paid student staff, to provide their service. *See* J.A. 237-38; J.A. 178, ¶ 3. If both students and

non-students are served, the GSSF grants should fund "only those portions of the programs that directly serve students." J.A. 237. Moreover, no GSSF grant recipient can use those funds for political lobbying or for politically partisan activities. J.A. 238; J.A. 252.

The SSFC process for reviewing applications and allocating GSSF money is viewpoint-neutral. Stip. ¶ 12. The central issue is whether such funding is necessary to support a service that directly aids many UW students and that significantly advances student health, safety, or academic success. *See supra* at 23. Applicants must identify "specific University needs and problems of the identified target population which th[e] service intends to address," discuss the "size, extent, or severity of the problem(s)," and cite supporting documentation. Stip. ¶ 25, Att. I, at 4.

The GSSF program creates the incentive for and financially sustains a diverse, innovative array of widely used student services, which not only directly help students, but also provide unique educational experiences in community service for student leaders, staff and volunteers. In 1995-96, for example, the largest GSSF grants went to the SAFEride Bus service, the student radio station, and the Greater University Tutoring Service (GUTS). J.A. 137. The program funded a Community Law Office, groups that work to prevent rape and help rape victims, a Student Tenant Union, and Vets for Vets, a support service for veteran students. Similarly, as the Associate Dean of Students has described,

> This [GSSF] group of services also includes the Lesbian, Gay, Bisexual Center and the Campus Women's Center which provide information and support for LGB students and women at the University, groups that have been and may yet be targets of discrimination, attack or ignorance. For many students, these centers with their staff, small

> libraries, and various programs are important sources of support and serve as evidence that they are welcomed to the University community.

J.A. 178, ¶ 3. The UW project of the Madison AIDS Support Network received a GSSF grant "to target the University community for special efforts to provide information about AIDS to students." *Id.*[15]

The amount of each student's mandatory fee that pays for the GSSF program each semester has recently ranged from approximately $6.50 to $13.50. Stip. ¶¶ 5-6. Organizations that receive GSSF support, like ASM grant recipients, do not get cash or lump sum payments from the University. Rather, the University itself pays the expenses covered by the grant to third party creditors or employees. Stip. ¶ 21. All the GSSF program money remains in the state treasury until such bills are paid to cover the costs of service provision. J.A. 244-52.

2. Because Their Student Fees Fund The University's Broad Services Program, And Not Individual Private Groups, Plaintiffs Do Not Suffer A Cognizable First Amendment Injury.

Plaintiffs frame their case as if the state is forcing them to contribute directly to a few of the GSSF grant recipients, the

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[15]Plaintiffs exaggerate the political activities of UWGreens, the RSO awarded the smallest GSSF grant in 1995-96, and depart from the undisputed facts. *See* J.A. 181, ¶¶ 24-27. Even if plaintiffs could establish that UWGreens' mission or some of its activities fell outside the GSSF program requirements, however, that would be an isolated implementation issue and not grounds for striking down the University's policy decision to establish this fund and pay for it with mandatory student fees. Plaintiffs are, regardless, funding the overall viewpoint-neutral GSSF program and not any single group. *See infra* at 26-28. Moreover, plaintiffs challenge only University policy in this suit, and do not here challenge individual implementation decisions at the ASM or SSFC level. *See* J.A. 8, ¶ 77.

few whose activities or perspectives plaintiffs do not endorse. As shown above, that is not an accurate portrayal of what the GSSF portion of the mandatory fee does. It goes into the state treasury, and from there helps pay for the costs of a varied range of student services, which have in common only (a) their help to large numbers of students, (b) their benefit to health, safety, and academic success, and (c) their inability to find funding elsewhere. The GSSF funding process is concededly viewpoint-neutral. Moreover, this University effort to make as many practical services available to students as possible does not have an expressive agenda, let alone a political or ideological one. Like the ASM program but in another realm, this is a state program designed to support many organizations and their diverse contributions to campus life.

Thus, payment of the GSSF portion of the mandatory fee inflicts no First Amendment injury on students, because it is simply payment to the University for this viewpoint-neutral services program. Subsidizing such a grant program does not engender a cognizable "crisis of conscience," *Glickman*, 117 S. Ct. at 2139, or interfere with students' freedom of belief, even if they strongly disagree with the actions or views of one or more individual organizations that eventually receive GSSF support. *See also supra* at 11-14. The plaintiffs cannot make their fee and the GSSF financial support that aids particular groups into a federal constitutional matter, any more than they could challenge the portion of the fee that goes to the University health service, which might employ doctors or contract with organizations that vocally support abortion, or to the Child Care Tuition Assistance Program, which undoubtedly provides tuition grants to some politically active students with views unlike plaintiffs.[16]

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[16]*See generally Goehring v. Brophy*, 94 F.3d 1294, 1303 (9th Cir. 1996) (distinguishing the injury at issue in *Keller* from mandatory student fees that fund student health insurance programs, which in turn pay for

This lack of First Amendment injury holds true even if grant recipients facilitate the political speech of others through their service provision, or if the services themselves might be seen to embody a political message. For example, the student radio station, in addition to the public service information it provides, also likely gives air time to individuals' political expression and debate. Similarly, both the Campus Women's Center and *amicus* LGBT Campus Center publish newsletters as part of their support for women and gay people on campus, with articles expressing the various views of contributors on political and other subjects.[17] Moreover, because Vets for Vets provides support services for veterans and works to ensure their equal place in the University community, and the Women's Center and LGBT Campus Center serve similar goals, the existence or activities of those groups could be termed political. Likewise, the Student Tenant Union's help for renters and the Rape Crisis Center's work to prevent rape or support rape survivors have political aspects. Yet each organization remains only one among many funded through the GSSF program. J.A. 137. The services program itself is viewpoint-neutral and designed by the University to improve the health, safety and academic success of the student body,

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private abortion providers; "the characteristics and function of the University are much more akin to those of the typical government agency than are those of the State Bar. The University, like a state government, provides a wide spectrum of services to students, whereas the State Bar acts largely as an intermediary between its members and the state government, working to advance certain specialized interests"), *cert. denied*, 520 U.S. 1156 (1997).

[17]Contrary to the record, both plaintiffs and the court of appeals describe items in these newsletters that reflect solely the views of the author and portray them as expression of the funded group. *See* J.A. 174, ¶¶ 5-6, 8; J.A. 181, ¶¶ 13-21. Although authors writing in their newsletters have mentioned particular legislative proposals, neither the Campus Women's Center nor the LGBT Campus Center engages in lobbying. *Id.*

not to serve any political or advocacy goal. As such, it does not give rise to a First Amendment claim by students who object to this use of their mandatory student fee.

B. Even If The Objecting Students Had Significant First Amendment Interests At Stake, The University's Important Health, Safety, And Educational Needs, Greatly Served By The GSSF Program, Would Outweigh Those Interests.

The University cannot accomplish its mission unless its students have the safety, physical health, self-esteem, time, and academic resources that are necessary prerequisites to study and learning at the university level. *See* R26, Att. A at 1732 ("universities are obligated not only to provide high-quality academic programs, but also to provide supportive activities affecting student academic achievement, life, and interests"; it is "essential to creat[e] a healthy, stable environment suitable for effective teaching and learning"). The General Student Services Fund, along with other student services paid for with direct allocations of the mandatory fee, ensures that all UW students will be able to take advantage of the challenging academic program and other learning experiences (such as the ASM forum) without their attention being diverted by weighty personal or practical concerns.

Students who have safe transportation, help with legal or housing problems, knowledge about rape prevention and AIDS prevention, help in coping with other sexuality issues, tutoring resources, and a sense of community and belonging at the University will fully engage in the educational process, as university students must to succeed. These are the types of services available thanks to the GSSF program. J.A. 137. Indeed, the Campus Women's Center, like many of the other GSSF grant recipients, provides not one but multiple services that can make a crucial difference in individual students' lives. The Center offers free child care, runs facilitated support

groups on such subjects as depression, eating disorders, and surviving sexual assault, and runs a referral service to hook students up with other social service agencies, in addition to publishing its newsletter and maintaining a library. J.A. 174, ¶ 3. The LGBT Campus Center offers analogous help, information, and support. *See supra* at 1.[18]

In addition, the University benefits from the hands-on learning opportunities that the GSSF service organizations represent. The students who plan new service programs, lead existing ones, and work or volunteer for these groups learn what it means to run a service agency and give back to their immediate community. As GSSF staff and volunteers enable their student clients to cope with practical problems and focus more attention on learning, the service providers also expand their knowledge. *See Carroll II*, 42 F.3d at 128 (constitutional to fund "activities that provide . . . students with hands-on educational experiences" with mandatory fees).

Most importantly, though, this University understands that its heterogeneous students have a variety of pressing health, safety, and academic resource needs. Both to pave the way for students' pursuit of demanding educational goals and to act responsibly toward the young people in its care, the University uses this fund to fill those social service needs. The GSSF funding criteria, moreover, underscore that these services would not be available but for the GSSF grant program. *See supra* at 23. Therefore, even if objecting students had significant First Amendment interests in avoiding the GSSF portion of the mandatory fee, the University's weighty goals would prevail under the balancing test.

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[18]Programs like these are often funded by universities through money raised with a mandatory student fee. *See, e.g., Chess v. Widmar*, 635 F.2d 1310, 1312 n.1 (8th Cir. 1980) (funding of Student Services Commission, Women's Union, and others), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

Like the ASM program, this carefully designed, viewpoint-neutral grant system for a wide array of service groups is constitutional as it stands and does not require any remedy. There is no danger here, as there was in the union and bar cases, of the University pursuing a narrow, partisan end with these fees. It is constitutionally bound to adhere to viewpoint neutrality. Furthermore, the GSSF program itself screens applicants to ensure that their services will have a significant impact on campus. Thus, as with the ASM funding stream, no separate "germaneness" inquiry or fee opt-out could be applied without cutting into the heart of the program and the important state interests it serves. *See supra* at 19-22.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

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Respectfully submitted,

*Patricia M. Logue
Ruth E. Harlow
Lambda Legal Defense and
Education Fund, Inc.
11 E. Adams Street, Suite 1008
Chicago, IL 60603
(312) 663-4413

Attorneys for *Amici Curiae*

* *Counsel of Record*

APPENDIX

Student Group *Amici* In Addition To The LGBT Campus Center

From Public Colleges and Universities:

The Alternative Lifestyle Student Organization at Morehead State University

The American Civil Liberties Union Chapter at the University of Illinois, Urbana-Champaign

The Bisexual, Gay, Lesbian Alliance at the State University of New York, College at Oswego

Carolina Alternative Meetings of Professional and Graduate Students at the University of North Carolina, Chapel Hill

Crossroads at Indiana University, Bloomington

The Evergreen Queer Alliance at Evergreen State College

Everywoman's Center at the University of Massachusetts

The Feminist Majority Leadership Alliance at California State University, Sacramento

The Feminist Majority Leadership Alliance at Portland State University

The Gay, Lesbian, and Bisexual Alliance at the State University of New York, College at Cortland

The Gay, Lesbian, Bisexual Alliance at the University of Oklahoma

The Iota Tau Chapter of Sigma Alpha Iota Women's Music Fraternity at the University of North Carolina, Chapel Hill

The Lambda Law Association at Indiana University School of Law, Indianapolis

The Lambda Law Student Association at the School of Law, University of California, Davis

LBGTgrad at the University of California, Davis

The Lesbian and Gay Rights Advocates at the James E. Rogers College of Law, University of Arizona

The Lesbian, Gay, Bisexual, and Transgender Caucus at Boalt Hall School of Law, the University of California, Berkeley

The Lesbian Gay Bisexual Student Union at the University of Delaware

OUTlaw at the University of Colorado Law School

OUTLaws at the University of Michigan Law School

People Realizing Individuality and Diversity Through Education at the Illinois State University

The Queer Student Cultural Center at the University of Minnesota, Twin Cities

Queers & Allies: LesBiGayTrans Services of Kansas at the University of Kansas

Quiet Women Engaging Reform at the University of Michigan, Ann Arbor

SafeZone at the University of Illinois, Urbana-Champaign

Swarm of Dykes at Ohio University

The Triangle Club at Seattle Central Community College

The Undergraduate Women's Studies Association at the University of Michigan, Ann Arbor

From Private Colleges and Universities:

The Advocates at Goshen College

The Allegories at Vassar College

Alternatives at Midwestern University

The American Civil Liberties Union Chapter at the Syracuse College of Law

The Bisexual, Gay and Lesbian Alliance at Northwestern University

The Bisexual Lesbian Gay and Trans Alliance at the University of Tulsa

The Bisexual-Gay-Lesbian-Transgendered Union at Williams College

The Community Government at Antioch College

The Emory Gay and Lesbian Advocates at Emory University School of Law

The Gay and Lesbian Alliance at Central College

The Gay & Lesbian Student Association at Harvard Business School, Harvard University

GayLaw at the Illinois Institute of Technology, Chicago-Kent College of Law

GWPride at George Washington University

Hillel Cultural Life at Northwestern University

OUTlet: Students Against Homophobia at Oglethorpe University

OutSpoken at Pomona College

Pride DePaul at DePaul University

The Queer Coalition at Vassar College

Queers and Associates at the University of Chicago

Students for Women's Concerns of the Feminist Majority Leadership Alliance at Vanderbilt University

The Women's Coalition at Northwestern University

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No. 98-1189

In The

Supreme Court of the United States

BOARD OF REGENTS, UNIVERSITY OF WISCONSIN,

Petitioner,

v.

SOUTHWORTH, SCOTT, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE STUDENT PRESS LAW CENTER, THE ASSOCIATED COLLEGIATE PRESS, AND COLLEGE MEDIA ADVISERS, INC., AS AMICI CURIAE IN SUPPORT OF PETITIONER

LUCY A. DALGLISH
Counsel of Record
MICHAEL J. WAHOSKE
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.

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Protecting the flag will burn free speech, Minn. Daily, May 5, 1999 12

INTERESTS OF THE AMICI CURIAE

Amici are three non-profit, student media organizations that have a compelling interest in the determination of the question presented to this Court: whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.[1] *Amici* represent student publications, including many student newspapers that serve as the primary source of information for their campus. Most of these publications engage in political or ideological speech and many are dependent upon student fee support. An affirmation by this Court of the decision of the court of appeals could threaten the very existence of student media on hundreds of public college campuses nationwide.

The Student Press Law Center is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the student press, the Center has collected information on student press

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of the brief.

cases nationwide and has submitted various *amicus curiae* briefs, including to this Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). The Center has produced a number of publications on student press law, including its book, *Law of the Student Press*, Student Press Law Center, Inc., 2d ed. (1997), and its thrice-yearly magazine, the SPLC Report.

The Associated Collegiate Press is a division of the National Scholastic Press Association, a non-profit association of student media groups at colleges, universities and secondary schools throughout the United States and in several other countries. Founded in 1921, the college division represents about 700 media organizations and more than 20,000 college journalists. The associations provide journalism education and recognition opportunities for their members, including reporting competitions and programs on press law and ethics.

College Media Advisers, Inc., represents the people who advise the nation's collegiate newspapers, yearbooks, magazines, and electronic media. With more than 700 members from coast to coast, the nonprofit CMA has been working since 1954 to support both new and veteran advisers of college media programs. CMA's mission is to educate and inform advisers about their roles in serving students and about the teaching, advising, and production of collegiate media. It also seeks to advance the quality of the student media its members advise. To achieve this mission, CMA offers conventions, workshops, conferences and seminars; serves as the authoritative voice of the collegiate media and advisers; provides and disseminates research and information for and about collegiate media and advising; and provides a learning

environment that promotes excellence and ethical standards in all aspects of mass communication.

Amici are gravely concerned over the decision rendered by the court of appeals in this case, which could cripple student media on America's public college and university campuses. *Amici* accordingly support the Petitioner in challenging the decision.

SUMMARY OF THE ARGUMENT

It has long been clear that expression by college students at publicly funded institutions is to be afforded the highest degree of First Amendment protection. *Healy v. James*, 408 U.S. 169, 180 (1972). Numerous lower courts have recognized that student media increase the overall exchange of information, ideas, and opinion on campuses; that student publications are a vital part of a university's educational mission; and that some form of mandatory fee support of such publications is germane to a university's duties as an educational institution.

A significant percentage of public college newspapers and broadcast stations receive student activity fee funding, and many could not publish without it. Although the court of appeals purported to leave open the question of whether public colleges and universities could subject student publications and broadcast stations to funding restrictions if they engage in political or ideological expressive activity, *Southworth v. Grebe*, 154 F.3d 717, 727, n.8 (7th Cir. 1998), the fact is that virtually all student news media provide some sort of political commentary or opinion. After the decision of the court of

appeals in this matter was handed down, the Student Press Law Center began receiving calls for help from student editors at public colleges where administrators and others relying on that decision threatened to revoke activity fee funding if the student publication persisted in writing "political" or "ideological" editorials. It is difficult to imagine a greater threat to student expression on a college campus than shutting down the primary student newspaper for lack of funding – yet that is the insidious nature of the court of appeals' decision and exactly what *amici* foresee as the result if that decision is allowed to stand. Accordingly, *amici* urge this Court to recognize that effect and to follow instead the proper balance already struck by this Court in the analysis applied in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

ARGUMENT

A. This Court has recognized that a college is a "marketplace of ideas" where students should be encouraged to speak freely and openly, and the lower courts have protected that special marketplace against various forms of censorship.

For more than 30 years, this Court has made it clear that expression by college students at publicly funded institutions is to be afforded the highest degree of First Amendment protection. *Healy v. James*, 408 U.S. 169, 180 (1972). This Court in *Healy* recognized that a "college classroom with its surrounding environs is peculiarly the

'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Id.* at 180-81.

College media play an integral role in fostering free expression on campus. The lower courts have taken this Court's statements in *Healy* to heart, and have allowed public college administrators to censor student media only when they can clearly show the speech is legally unprotected (libelous, obscene, violative of copyright, etc.) or when they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content. *See, e.g., Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1973), *cert. denied*, 430 U.S. 982 (1977); *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), *cert. denied*, 423 U.S. 834 (1975); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973); *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc with modification*, 489 F.2d 225 (5th Cir. 1973 (per curiam), *cert. denied*, 416 U.S. 995 (1974); *Lueth v. St. Clair Community College*, 732 F. Supp. 1410 (E.D. Mich. 1990); *Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 148 (D. Neb. 1986), *aff'd*, 829 F.2d 662 (8th Cir. 1987); *Mazart v. State*, 441 N.Y.S.2d 600, 605 (N.Y. Ct. Cl. 1981); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983), *cert. denied*, 442 So. 2d 453 (La. 1983); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (N.Y. 1973); *State Board for Community Colleges v. Olson*, 687 P.2d 429 (Colo. 1984), *appeal after remand*, 759 P.2d 829 (Colo. Ct. App. 1988).

In several of these cases, the attempted censorship of student media took the form of elimination of student fee funding for publications that offended the administrators

or some students who were paying mandatory fees used in part to fund the media. According to one student press expert, by 1985, the lower courts had considered 20 cases challenging the legal authority for state colleges to use mandatory student fees to finance student publications. L. Ingelhart, *Student Publications: Legalities, Governance, and Operation*, at 47 (Iowa State University Press 1993). In each case, the student publication won, and the funding continued. *See, e.g., Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992); *Stanley, supra*, 719 F.2d 279; *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Arrington v. Taylor*, 380 F. Supp. 1348, 1366 (M.D.N.C 1974); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb. 1973); *Larson v. Board of Regents*, 204 N.W.2d 568 (Neb. 1973).

Most recently, this Court made clear that public schools cannot use the denial of support based in part on student activity fee funding as a method of dictating the viewpoint of a student publication. *Rosenberger, supra*, 515 U.S. at 837.

Many of the cornerstone cases cited above were decided at a time of great unrest on this nation's campuses – a time when the campus marketplace of ideas was almost overwhelmed by conflicting viewpoints. The student press reported and commented on war protests, demonstrations over lowering the voting age to match the draft age, and the evolution of women's rights. Activities, ideas, and beliefs we have come to take for granted originated in the open forum provided by this nation's college campuses. Throughout that troubled time, the lower courts protected student expression at public universities and recognized the important role of student

media in fostering debate on campuses by refusing to allow student fee support to be cut for those media.

B. A significant percentage of public college publications receive student activity fee funding, and many could not publish without it.

There is little doubt that without the support of the student fee funding protected by the lower courts, a significant percentage of public college media would not have survived. During the 1980s, the United States had approximately 3,600 public and private college campuses. Ingelhart, *supra*, at xii. On these campuses there were more than 3,000 student newspapers, nearly 2,000 yearbooks, and at least 1,800 magazines or other student publications. *Id.* Circulations of these publications approached 25 million copies annually, and expenditures approached $150 million annually. *Id.* There were hundreds of other types of publications produced by student organizations, and hundreds of student-operated radio stations on the air. *Id.* At the close of the decade, there were almost 20 student-run television stations. L. Kopenhaver & R. Spielberger, *Survey Update*, 34 C. Media Rev. 30, 36 (Spring/Summer 1996). In recent years, these publications also have begun posting information and fostering debate on the Internet.

While student publications in the United States typically receive revenue from a combination of sources, such as subscriptions, advertising, general college funds and student activity fees, very few campus publications are entirely financially independent from their university. For example, at the end of the 1980s, only 11 student

newspapers were totally funded by advertising revenue – 10 at public universities and one at a private college. Ingelhart, *supra*, at 53.

During that same time period, more than 90 percent of the newspapers and magazines, and nearly 80 percent of yearbooks, were financed in some way by allocations from general college funds or from mandatory student fees. *Id.* at xii.

The most recent survey data available indicates that most student publications remain dependent on university funding of some sort, including student activity fees. In 1995, for example, student activity fees funded (either wholly or in part) 43.3 percent of student newspapers, 25 percent of student magazines, 36.4 percent of student television stations, 35.5 percent of campus radio stations, and 37.6 percent of student yearbooks. *Survey Update*, *supra*, at 34-37. By 1998, 32.5 percent of the nation's student newspapers received 50 percent or more of their revenue from student fees. L. Kopenhaver & R. Spielberger, *Independent College Newspapers: Do They Meet the Standards?*, 36 C. Media Rev. 4, 9 (Summer 1998).

Elimination of student fee support for the student press would destroy most campus publications. *See, e.g., Joyner, supra*, 477 F.2d at 460. If the publications managed to survive, they would be but a shadow of their formerly vibrant selves, with reduced coverage and scant circulations. Ingelhart, *supra*, at 60. Student publications do not operate like the "commercial" press. It is unrealistic to expect most campus newspapers to rely on advertising and subscription revenue in the same manner as the commercial media, which have a complement of full-time

circulation directors, bookkeepers, advertising sales staff members, drivers, carriers, and newsstand dealers. *Id.* at 61. Moreover, many schools are located in small towns or rural areas that do not have the advertising base to support a student newspaper. Without student fee support, such publications would cease to exist.

Colleges and universities have long recognized that an active student press provides an important component of their educational mission, one that both deserves and requires financial support. As Professor Ingelhart stated:

> College administrators, teachers, and board members are realizing that espousal of a free press, with its imperfections, hoopla and stridency, provides great learning for the practical journalist and the campus reader alike. It is the best practical example and exercise of what the tussle of thinking and learning is all about. It is almost impossible to teach thinking, learning, testing, experimenting, mistaking, achieving, creating, and knowing in the sequester called a classroom and then deny any public evidence that such things might be occurring on the campus among the students. The campus press is a clarion demonstration of the university's being a university doing the work of a university. As such it belongs on the campus, in the catalog, and in the budget.

Ingelhart, *supra*, at xii-xiii.

Any decision that would require an end to student fee support will, as a practical matter, force many colleges to forego the enormous educational value of a strong, robust and vital student press.

C. The decision of the court of appeals, if allowed to stand, threatens the public forum provided by student media at public universities.

The court of appeals purported not to address the issue of student fee support for campus-wide "official" student publications because the plaintiffs did not challenge fee support for those publications. *Southworth, supra,* 151 F.3d at 727, n.8. The basis for the court of appeals' holding, however, is not so limited: "Whether or not the student fees directly fund the political or ideological activities is irrelevant; the First Amendment is offended by the Regents' use of objecting students' fees to subsidize organizations which engage in political and ideological activities." *Id.* at 732.[2]

The simple fact is that virtually all student publications provide some political or ideological commentary or opinion. Those opinions frequently offend, anger or tantalize someone, and often launch vibrant debate on campuses. Such is the great history and contribution of student publications in this country. One of the first cases in the lower courts to deal with a challenge to student fee support for a student publication provides an example. In *Arrington v. Taylor, supra,* plaintiffs objected to the University of North Carolina student newspaper's editorial positions on endorsements of the candidacies of Hubert H. Humphrey, George McGovern and Sergeant Shriver,

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[2] Indeed, the wording of the Question Presented on which this Court granted certiorari does not exclude student fee support for student media from the issue before the Court. *See* page i, *supra.*

among many others, and to positions taken on "the use of busing to integrate public schools, . . . the United States intervention in Cambodia, the impeachment and removal of Richard M. Nixon, the appointment of William H. Rehnquist, the death penalty, the Equal Rights Amendment, student strikes, Food Worker's strikes, protests against the war in Southeast Asia, and abortion." 380 F. Supp. at 1357. In denying the challenge to the use of the objecting students' fees partially to subsidize the student paper, the *Arrington* court correctly recognized that a lively editorial page encourages political debate throughout a campus:

> The Daily Tar Heel . . . provides a forum for those who operate it to express their views. The positions advocated in The Daily Tar Heel are no more permanent than the brief tenure of its editors and writers. Moreover, the Daily Tar Heel is much more than a forum for its staff. It not only prints timely local and national news items, but also invites and prints views contrary to expressions by those in control.

Id. at 1362.

Student media are no less vibrant today. In the past school year, the Student Press Law Center has collected copies of student publications that editorialized from various political perspectives on issues ranging from the legalization of marijuana, election endorsements, the presidential impeachment trial, gay and lesbian rights, and resegregation of universities due to the end of affirmative action. The editorial and opinion pages of the Minnesota Daily, for example, a well-respected, fee-supported student publication serving one of the nation's

largest campuses at the University of Minnesota, reflect issues of concern today. In the past three months, The Daily has taken editorial positions or published commentary on NATO airstrikes against Serbia,[3] the Israeli-Palestinian conflict,[4] the proposed constitutional amendment to ban desecration of the U.S. flag,[5] and this Court's recent decision allowing a school district to be sued for student sexual harassment.[6]

Not surprisingly, the lower court's decision already has had a negative impact on this nation's campuses. The Student Press Law Center has begun to receive calls from college journalists who report that school administrators and others in control of funds are beginning to tell them to discontinue printing political editorials or endorsements. For instance, at Florida A & M University, the student senate voted March 3, 1999, to freeze funding of the official student newspaper, The Famuan, after the paper ran political editorials prior to campus elections. *Famuan Funds Frozen*, The Famuan, March 18, 1999, at 1. The student senate said it cut funding because the paper published political endorsements as part of its student government election coverage, something the newspaper has done periodically for at least 20 years. In April, the

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[3] *Airstrikes will not solve any problems*, Minn. Daily, March 30, 1999, at 6.

[4] Imed Labidi, *Israel's tragic past is key to Palestine's future*, Minn. Daily, March 8, 1999, at 8.

[5] *Protecting the flag will burn free speech*, Minn. Daily, May 5, 1999, at 6.

[6] *Harassment suits do not belong in schools*, Minn. Daily, May 27, 1999, at 6.

student senate passed a preliminary budget for The Famuan that decreased the 1999-2000 student fee allocation by 31 percent. *See "Paying for free speech: Student dissenter cases threaten 'political and ideological' censorship of the college media,"* SPLC Report, at 30 (Spring 1999).

At the University of North Carolina at Chapel Hill, new student government rules prohibit the allocation of student activity fee money to any campus organization that publishes or makes political endorsements, including the alternative campus magazine, the conservative Carolina Review. The University of North Carolina student legislature added a provision to its code prohibiting student activity fee funding of any "political and ideological" activity or speech by any campus student organizations. *Id.*

Thus, despite the court of appeals' disclaimer, affirmation of the lower court's decision will at the very least create confusion regarding funding for student publications and will threaten their very existence.

D. The expressive activity of student organizations receiving student activity fees should not be regulated, as long as there is a neutral process for disbursing the fees.

As argued by the Petitioner and other *amici*, which arguments will not be repeated in any detail by these *amici* here, the proper analysis for challenges to the funding of expressive activity on college campuses should be similar to that already adopted by this Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). *Rosenberger* held that when a university

sets up a system whereby students contribute fees to a general activity fund, and those funds are in turn distributed to a diverse group of campus organizations, the university creates a limited public forum that engenders certain rights in forum participants. Such rights include the requirement that a school distribute funds in a neutral manner to campus organizations. *Id.* at 834-5. Although reserving the precise question presented here, *see id.* at 840, the Court in *Rosenberger* concentrated its analysis on the peculiar importance to the nation's intellectual life of the open fora with diverse participants which colleges provide, and on the level of neutrality of any policies by which the state fosters participation therein. *Id.* at 841-846. In the course of applying that neutrality analysis to the question of the denial of student fee-based state support for a Christian student publication, this Court recognized the unique role universities play in fostering free speech and the dangers posed by government attempts to restrict it:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

Rosenberger, supra, 515 U.S. at 835, citing *Healy, supra,* 408 U.S. at 180-81, *Keyishian v. Board of Regents of Univ. of State*

of N.Y., 385 U.S. 589, 603 (1967), and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Relying on these decisions of this Court, lower courts other than the court of appeals here have appropriately recognized that a university is different from the labor unions and state bar organizations at issue in the compelled association cases cited by the court of appeals in the instant case. *Cf. Southworth, supra,* 151 F.3d at 722, citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977), and *Keller v. State Bar,* 496 U.S. 1, 13 (1990). They have observed that "[t]he goals of the university are much broader than the goals of a labor union or state bar, and they are inextricably connected with the underlying policies of the First Amendment." *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032, 1039 (9th Cir. 1999). They have recognized that the provision of student activity fees to assist expressive student organizations should not be regulated as long as the process for disbursing those fees is neutral and supports a wide variety of student political and ideological activity. *Id.* Such a system fosters the limited public forum envisioned in *Rosenberger*, 515 U.S. at 829-30, that encourages "a diversity of views from private speakers" on college campuses. *Id.* at 834. Such a system also assures the vitality of the campus press, and the vital role it plays in creating and fostering the campus forum. For those important reasons, articulated in detail by Petitioner and other *amici*, these *amici* respectfully urge the Court not to allow the decision of the court of appeals to stand.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

LUCY A. DALGLISH
Counsel of Record
MICHAEL J. WAHOSKE
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600

Counsel for Amici Curiae

Of Counsel
S. MARK GOODMAN
MICHAEL C. HIESTAND
STUDENT PRESS LAW CENTER
1815 North Fort Myer Drive, Suite 900
Arlington, VA 22209
(703) 807-1904

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONERS

BURT NEUBORNE
KIMANI PAUL-EMILE
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the Americas
Fifth Floor
New York, NY 10013
(212) 998-6730

SCOTT D. MAKAR
Counsel of Record
ROBERT BERGEN
MICHAEL J. FREVOLA
CAMILLE NICODEMUS
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amicus Curiae
The Brennan Center for Justice at
New York University School of Law

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INTEREST OF *AMICUS CURIAE*

With the consent of the parties, the Brennan Center for Justice at New York University School of Law submits this brief *amicus curiae* in support of Petitioners.[1] Letters of consent are on file with this Court.

The Brennan Center for Justice at New York University School of Law (the "Center") is a non-partisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice William Brennan, Jr. To that end, the Center has created a Democracy Program and a Poverty Program, which undertake projects that promote equal citizenship and other core ideals of democratic government.

The Center files this brief *amicus curiae* in support of Petitioner because the University of Wisconsin's assessment of mandatory, non-refundable student activity fees to support, on a viewpoint-neutral basis, a limited public forum for the purpose of fostering an environment of learning and debate for all students, enhances the speech rights of all those participating in the forum and, thus, does not vest dissenting students with the right to opt out of the collective enterprise. The Center takes an interest in this case because of its implications for the ability of government to assist individuals lacking the financial resources to participate fully in the free market of ideas, and submits this brief in the hope of providing a workable framework for deciding student fee actions.

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1. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus*, has contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

Pursuant to state law, the University of Wisconsin System is charged with a broad educational mission including "[f]oster[ing] diversity of educational opportunity [and] serv[ing] and stimulat[ing] society by developing in students heightened intellectual, cultural and humane sensitivities." WIS. STAT. § 36.01 (1998). To assist in the execution of this mission, the Wisconsin Legislature enacted a provision that required the collection from each student in the University of Wisconsin System a mandatory, non-refundable student activity fee segregated from the students' fees for tuition. *See* WIS. STAT. § 36.09(5) (1998). Primary responsibility for the allocation of the funds collected through assessment of this mandatory student activity fee was delegated to the campus student governments by the Board of Regents of the University of Wisconsin System (the "Board"), although by statute the Board retained "final confirmation" authority for the disposition of the mandatory student activity fee. *Id.*[2]

Respondents are (or were) students at the University of Wisconsin-Madison during the pendency of this lawsuit. Respondents commenced this action against the Board in the United States District Court for the Western District of Wisconsin, seeking, *inter alia*, declaratory and injunctive relief for the University's alleged violations of Respondents' First Amendment right of free speech. Specifically, Respondents alleged that their free speech rights were violated by the University's requirement that Respondents fund various student organizations that espoused viewpoints with which Respondents disagreed.

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2. The University of Wisconsin System, the University of Wisconsin-Madison, the Board and the University of Wisconsin-Madison's student government are collectively referred to herein as the "University."

Both Respondents and the University moved in the district court for summary judgment. Among other issues, the parties stipulated that contribution to the mandatory student activity fee is required under state law and that the University's process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion. Both Respondents and Petitioners have conceded in briefs below that the mandatory activity fee funding program constitutes government creation of a public forum for the promotion of free speech pursuant to this Court's holding in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

The district court granted Respondents' motion for summary judgment on their freedom of speech claim, which determination was affirmed by judgment of the United States Court of Appeals for the Seventh Circuit dated August 10, 1998. The University requested rehearing of its appeal *en banc*, which request was denied by the United States Court of Appeals for the Seventh Circuit (three judges dissenting) by its opinion dated October 27, 1998.[3]

In January 1999, Petitioners, the members of the Board, requested that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 10, 1998. This Court granted the Board's petition on March 30, 1999.

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3. The opinion of the United States District Court for the Western District of Wisconsin is unreported. The opinion of the United States Court of Appeals for the Seventh Circuit, dated August 10, 1998 and affirming the district court's decision, is reported at 151 F.3d 717 (7th Cir. 1998). The opinion of the United States Court of Appeals for the Seventh Circuit, dated October 27, 1998, denying rehearing *en banc* of the University's appeal and containing the dissenting opinions of three judges, is reported at 157 F.3d 1124 (7th Cir. 1998).

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment right to free speech typically is implicated when government limits or suppresses speech. When government seeks to expand or produce a forum for speech, however, the First Amendment provides mutually exclusive protections for individuals in two distinctly different settings:

(1) When a government entity acts to enhance private speech, as in the establishment of a public forum on government property or the direct payment of speech subsidies, the First Amendment forbids the government entity from discriminating on the basis of viewpoint in granting access to the speech-enhancing resources. *See, e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829-31 (1995) (citations omitted).

(2) Conversely, when government itself generates speech, the First Amendment guarantees a dissenting individual the right to "opt out" of a government-mandated speech program. For instance, an opt-out is available where government requires an individual to express support for a particular viewpoint that is offensive to the individual's beliefs. *See, e.g.*, *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Likewise, an opt-out is mandated where a government-sanctioned private entity (such as a labor union engaged in an agency shop, or an integrated bar association) uses a portion of a dissenting individual's government-compelled contribution to advance a single political viewpoint that is not germane to the organization's core purpose. *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

The Seventh Circuit decision below conflated these two forms of First Amendment protection and thereby permitted a dissenting individual to opt out of supporting a government-

created public forum, even when the public forum is being administered in a viewpoint-neutral manner. Because involuntary support of a single viewpoint is the *sine qua non* of a compelled speech claim, a First Amendment opt-out is available only in those settings where First Amendment viewpoint-neutrality protection is unavailable. *See, e.g.*, *Abood*, 431 U.S. at 220-21; *Barnette*, 319 U.S. at 634-35. In the public forum context, an individual's First Amendment rights are protected not by permitting opt-outs, but by the assurance of viewpoint-neutrality in the administration of any fee-based program. In First Amendment settings such as a public forum, where viewpoint discrimination is prohibited, the issue of compelled speech does not arise. The constitutionally guaranteed participation of varied and contradictory voices precludes the involuntary association of any individual with any particular voice. If opt-out protection were extended to individuals asked to support a public forum, which by its very nature must be inclusive of even highly controversial views, the ability of government to foster or create a forum for speech would be circumscribed dramatically.

In *Rosenberger*, this Court observed that a university's funding of a variety of student organizations through a student activity fund creates a public forum for the purpose of promoting free speech and intellectual debate on campus. *Rosenberger*, 515 U.S. at 830. The free speech rights of dissenting students are safeguarded fully by requiring that *all* political or ideological positions — including those held by Respondents — have available equal access to the public forum funded through their mandatory activities fee.

Despite this important protection, the Seventh Circuit held that the University's imposition of the mandatory, non-refundable activity fee infringed upon individuals' First Amendment freedoms under the rubric of *Abood* and its progeny because some of the groups that received viewpoint-

neutral funding advocated political views objectionable to Respondents. This concept, however, would grant a free speech right to opt out of virtually any government-imposed financial obligation that ultimately provides funding to groups with which individuals disagree. The insistence on an individual opt-out where collective funds are used to create a viewpoint-neutral forum is inconsistent with the very idea of government. Such a limitless opt-out would re-cast government as merely a voluntary association of individuals who may decide unilaterally which obligations of citizenship to honor.

This Court has repeatedly, and necessarily, rejected such an atomistic view of our society. Even in the more sensitive arena of religious freedom, this Court has denied individuals the right to opt out of financial support for programs for the collective benefit of society, despite those individuals' religion-based objections. *E.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (rejecting Free Exercise claim to exemption from social security tax); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (rejecting Establishment Clause claim to real estate tax exemption to church as part of broad grant of exemptions to eleemosynary institutions).

In light of these principles, *amicus* respectfully urges that this Court reject First Amendment "opt-out" rights under the circumstances of this case.[4]

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4. *Amicus'* argument supports the University's distribution of the allocable portion of the mandatory student activity fee insofar as the funds are distributed on a viewpoint-neutral, non-discriminatory basis. *Amicus* takes no position on the distribution of mandatory student activity fees by the University pursuant to student referenda.

ARGUMENT

I.

THE USE OF MANDATORY STUDENT ACTIVITY FEES TO SUPPORT A PUBLIC FORUM ON A UNIVERSITY CAMPUS DOES NOT VIOLATE THE FIRST AMENDMENT'S BAN ON COMPELLED SPEECH BECAUSE THE FIRST AMENDMENT REQUIREMENT OF VIEWPOINT-NEUTRALITY FULLY PROTECTS DISSENTING STUDENTS' FREE SPEECH RIGHTS BY ASSURING THAT NO STUDENT IS REQUIRED TO AFFIRM OR SUPPORT ANY PARTICULAR OPINION EXPRESSED IN THE PUBLIC FORUM

When government involves itself in the generation of speech, this Court has established two types of mutually exclusive First Amendment protections to deal with radically different settings. In one setting, when government elects to use collective resources to assist private speakers to participate in the marketplace of ideas, as in the establishment of a public forum on government property, the First Amendment prohibits government from engaging in viewpoint discrimination in allocating access to the forum. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985).

In the wholly different setting where government itself compels speech, the First Amendment guarantees a dissenting individual the right to "opt out" of such compelled speech rather than support it financially or by deed. *See, e.g., Keller v. State Bar of Cal.*, 496 U.S. 1, 9-10 (1990); *Abood v. Detroit*

Bd. of Educ., 431 U.S. 209, 235-36 (1977); *Wooley v. Maynard*, 430 U.S. 705, 715, 717 (1977); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Thus, as in the flag salute case of *Barnette*, where a government regulation or policy forces an individual to express support for a particular viewpoint that is offensive to the individual's beliefs, the First Amendment guarantees the dissenting individual the right to opt out of the government-compelled speech program. *See Wooley*, 430 U.S. at 715, 717; *Barnette*, 319 U.S. at 642. Similarly, as in the agency shop or bar association cases, where a government-sanctioned entity uses members' compulsory financial support to express a particular political viewpoint on an issue that is not germane to the organization's core purpose, a dissenting individual may demand a *pro rata* opt-out. *See Keller*, 496 U.S. at 17; *Abood*, 431 U.S. at 237-38.

The Seventh Circuit decision below conflated these two First Amendment settings by permitting a dissenting individual to opt out when the only appropriate First Amendment protection was the enforcement of viewpoint-neutrality. As this Court's jurisprudence makes clear, a First Amendment opt-out right exists only where viewpoint-neutrality protections are absent. Thus, where government conscripts individuals to advance its public policy as part of the government's right to speak, dissenting individuals are guaranteed a First Amendment right to opt out. Similarly, where non-governmental entities like labor unions or bar associations, which speak in one voice in accordance with government's public policy, use compulsory funds to advance a particular viewpoint, dissenting individuals are permitted to opt out. But where, as here, viewpoint-neutrality protections are fully applicable, no basis exists for permitting a First Amendment opt-out.

The case law makes clear that the First Amendment opt-out protection is triggered only where there is compelled

speech — where a single viewpoint is being expressed to which all individuals must adhere or with which all group members are identified. This Court has never extended the opt-out protection of the First Amendment to a public forum, and for good reason. Whether a public forum is physically situated in a public park, on a sidewalk or in a transit bus, or is metaphysically present in the free-ranging opportunity created by subsidizing a broad spectrum of student organizations, no single individual, other than the actual speaker, can be identified with the wide variety of speech being expressed.

Allowing individuals whose funds support a public forum to opt out is, therefore, not necessary to protect their First Amendment rights. Enforcement of the ban on viewpoint-based discrimination already performs that function. The right to opt out of financially supporting a public forum would, however, grant certain individuals tyranny over the rights of others. The collective action necessary to create a venue for speech would be transformed into a voluntary assembly of individuals, each of whom, by opting out, could rend the common fabric and make such public fora impossible to sustain.

Thus, the fundamental flaw in the reasoning of the court in *Southworth* is its failure to recognize that the First Amendment guarantee of viewpoint-neutrality is separate and mutually exclusive from the right to opt out.[5] Where a First

5. In fact, the *Southworth* decision specifically held that the University must provide *both* protections:

> If the university cannot discriminate in the disbursement of funds, it is imperative that the students not be compelled to fund organizations which engage in political and ideological activities — *that is the only way to protect the individual's rights.*

(Cont'd)

Amendment right of viewpoint-neutrality exists, as in a public forum, no supporter of the public forum can be said to advance any particular idea. It is only in settings where viewpoint-neutrality is not required that opt-out rights are necessary to protect against compelled speech.

A. The University's Use of the Student Activity Fee to Subsidize a Broad Array of Speakers in a Viewpoint-Neutral Fashion Constitutes a Limited Public Forum

There is no doubt that the use of mandatory student fees to subsidize speech on the University's campus creates a public forum that must be administered in a viewpoint-neutral manner. This Court has made it clear that college campuses in general, and student activity funds in particular, are public fora subject to the First Amendment protections of content- and viewpoint-neutrality. *Rosenberger*, 515 U.S. at 831 (observing that "[t]he [student activity fund] is a forum more in the metaphysical than in a spatial or geographic sense, but the same principles are applicable"); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (holding that "[t]he campus of a public university, at least for students, possesses many of the same characteristics of a public forum").

The free speech interests of dissenting students are, therefore, fully protected by the First Amendment ban on viewpoint discrimination in allocating access to the forum. Under *Rosenberger*, the University's student activity fee creates, at a minimum, a limited public forum made up of many voices chosen on a viewpoint-neutral basis. Respondents are not entitled to an opt-out from the University's program because, as *amicus* demonstrates *infra*, under a regime of viewpoint-neutrality, no dissenting student

(Cont'd)
Southworth v. Grebe, 151 F.3d 717, 730 n.11 (emphasis added), *reh'g en banc denied*, 157 F.3d 1124 (7th Cir. 1998).

is compelled to affirm a particular belief or support a particular organization.

B. The University's Use of the Student Activity Fee to Subsidize a Broad Array of Speakers in a Viewpoint-Neutral Fashion Does Not Violate the First Amendment Ban on Compelled Speech Because No Dissenting Student is Compelled to Affirm or Financially Support a Particular Belief or Organization

A corollary to the First Amendment's guarantee of freedom of speech is the guarantee that individuals cannot be "compelled to speak" either by affirming a particular idea or doctrine, *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 642, or by financially supporting a particular viewpoint with which the individual disagrees. *Keller*, 496 U.S. at 5; *Abood*, 431 U.S. at 235.

In *Barnette*, Justice Jackson captured the essence of the First Amendment ban on compelled speech. In invalidating compulsory flag salutes, he wrote:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.

Barnette, 319 U.S. at 642.

Compelled affirmation of belief is an affront to human dignity. Whether the compulsion takes place in the context of religious intolerance,[6] or political zeal,[7] a free society

6. A principal reason that the Founders insisted on protections for religious liberty in the Bill of Rights was to ensure that individuals would be free from the use of government to compel religious belief.
(Cont'd)

cannot permit government power to be used to force individuals to affirm a belief in an officially prescribed idea. In *Barnette*, West Virginia required the children of Jehovah's Witnesses to pledge allegiance to the flag of the United States, despite the fact that their religious beliefs forbade them to acknowledge the sovereignty of any earthly power. *Barnette*, 319 U.S. at 629. This Court invalidated the requirement. *Id.* at 643. In *Wooley*, New Hampshire required its citizens to display the motto "Live Free or Die" on their car license plates, forcing individuals to appear to affirm belief in an idea they actually opposed. *Wooley*, 430 U.S. at 707. This Court invalidated the requirement. *Id.* at 717. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), Massachusetts required parade organizers to permit gays to march in a privately sponsored St. Patrick's Day Parade, thus compelling the parade organizers to appear to affirm ideas that they opposed. *Id.* at 574. This Court invalidated the requirement. *Id.* at 581. In each of the compelled belief cases, an individual was forced to make public obeisance to a particular idea with which the individual disagreed.[8]

(Cont'd)
See, e.g., Barnette, 319 U.S. at 646 (Murphy, J., concurring) (stating that "[o]fficial compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country after what Jefferson characterized as the 'severest contests in which I have ever been engaged' ") (quoting 1 THOMAS JEFFERSON, AUTOBIOGRAPHY, pp. 53-59).

7. Many efforts to compel affirmations of belief have been driven by political concerns. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating state university regulations requiring faculty members, as a condition of continued employment, to sign certificates stating, *inter alia*, that they were not Communists).

8. For additional cases invalidating efforts to compel an affirmation of belief, *see, e.g., Torcaso v. Watkins*, 367 U.S. 488 (Cont'd)

In addition to precluding government from forcing individuals to affirm or appear to affirm ideas with which they disagree, the compelled speech doctrine also prevents government from coercing individuals to provide financial support for disfavored ideas, whether or not they publicly affirm the idea. Thus, for example, the ban on compelled speech is violated when government officials require employees or contractors to contribute funds to a particular candidate or political party in order to obtain empioyment or promotion. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (invalidating removal of towing service from approved list for failure to contribute to incumbent mayor); *Branti v. Finkel*, 445 U.S. 507 (1980) (holding that newly named public defender could not dismiss assistants merely because they belonged to opposing political party); *Elrod v. Burns*, 427 U.S. 347 (1976) (same). Similarly, compelled speech concerns are implicated where a non-governmental entity uses compulsory dues to fund a particular viewpoint on an issue not germane to the organization's purpose. *Keller*, 496 U.S. at 9; *Abood*, 431 U.S. at 235-36. In each of the compelled financial support cases, an individual was required to give financial support to a particular idea with which the individual disagreed.

Respondents argue that the prohibition on government-compelled speech recognized in *Barnette* and *Wooley*, and

(Cont'd)
(1961) (invalidating law requiring all holders of public office to affirm belief in the existence of God); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating state rule that veterans' property tax exemption was available only to persons who affirm that they do not advocate forcible overthrow of government); *Cummings v. Missouri*, 4 Wall (71 U.S.) 277 (1867) (invalidating requirement of disavowal of Confederate sympathy in order to preach); *Ex parte Garland*, 4 Wall (71 U.S.) 333 (1867) (invalidating requirement of disavowal of Confederate sympathy in order to practice law in federal court).

applied by the Court in *Abood* and *Keller*, requires the University to offer *pro rata* refunds to dissenting students of any portion of their compulsory student fees used by organizations that espouse positions with which the dissenting students disagree. Respondents reason that, in the absence of a *pro rata* refund, the dissenting students are forced, in Justice Jackson's words, to "confess by . . . act their faith in" ideas with which they disagree in violation of their First Amendment rights. This Court, however, has never recognized a right to a refund for dissenting contributors who provide financial support to a public forum.

1. *Respondents Have Not Been Compelled to Affirm or to Appear to Affirm Any Particular Belief*

The mere payment of a mandatory student activity fee, a small percentage of which funds a public forum on a university campus, is not a compelled affirmation of belief within the meaning of *Barnette* and its progeny. To the contrary, the student activities fees are used to fund a forum that is open to a wide range of speakers and is designed to facilitate the exchange of information and diverse student ideas and opinions. Financial support for such a forum does not require students to endorse an offensive message, *see Barnette*, 319 U.S. at 631-32, affirm objectionable beliefs or ideological messages, *see Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion); *Wooley*, 430 U.S. 1428, respond to a hostile message when they would prefer to remain silent, *see Pacific Gas & Elec. Co.*, 475 U.S. at 15, or be publicly identified or associated with another's message, *see Hurley*, 515 U.S. at 577; *cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980).

By paying the fees at issue here, Respondents are not compelled to engage in any actual or symbolic speech, nor are they used as involuntary conduits for the University's

expressive activity. *See Wooley*, 430 U.S. at 715; *Barnette*, 319 U.S. at 641-42; *see also Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988) (invalidating statute requiring that professional fundraisers recite state-instituted disclosure statement when soliciting charitable contributions). Indeed, since the University imposes no viewpoint restraints on the freedom of students to communicate their messages, the mandatory payment in no way impairs Respondents' ability to express their own political or ideological positions. *See Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating general anti-solicitation regulation that impaired religious group's freedom of speech by precluding door-to-door distribution of literature); *cf. Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding requirement of financial support of generic advertising by dissenting members of government-established growers association).

The student activity fee assessed to each university student is used to support a forum for student groups to engage in speech, debate and other activities for the benefit of the entire student body. The fund is accessible to student groups without regard to viewpoint or ideology, and no particular side on any issue is encouraged or advanced to the exclusion of others. Rather, the funds are used, consistent with the University's mandate, to stimulate debate and encourage students to expand their views and consider various perspectives and viewpoints. The University's creation of such a forum goes to the heart of any university's purpose:

> the University's educational mission is precisely to combat orthodoxy by encouraging the dissemination of a multiplicity of views and interests, many of which will inevitably provoke controversy, debate and opposition. The collection and disbursement of the mandatory fee play an

> integral part in the University's educational function, by providing students with the modest financial assistance necessary to engage in student government and parliamentary debate, to organize around common interests, and to advocate and argue ideas in the spirited intellectual atmosphere of the university campus.

Smith v. Regents of the Univ. of Cal., 844 P.2d 500, 520 (Cal. 1993) (*en banc*) (Arabian, J., dissenting).

The broad and varied nature of the speech forum at issue precludes any "association" between an individual student and any of the contradictory and competing messages propounded by the various student groups. Thus, no students are coerced into speaking in order to disassociate themselves from messages they may find objectionable. Indeed, the more diverse the views expressed through the support of the fee, the less likely it is that any student can be seen as supporting any particular view.

This Court already has explicitly rejected the argument that compelled support of a public forum results in a compelled affirmation of belief. In *PruneYard*, the California Supreme Court had construed its state constitution as imposing a viewpoint-neutral requirement that the owner of a large shopping center permit persons to engage in First Amendment activities on his private property. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 78 (1980). The owner argued, *inter alia*, that the California rule forced him to appear to endorse speech with which he disagreed. *See id.* at 86. This Court held that a state law requirement that a shopping center be available for political activity on a non-discriminatory, content-neutral basis did not compel the property owner to affirm, or to appear to affirm, belief in any of the speech expressed in that forum. *See id.* at 86-88; *see also Capitol Square Review Bd. v. Pinette*, 515 U.S. 753

(1995) (rejecting argument that permitting Ku Klux Klan to sponsor a cross in a public forum would appear to give government endorsement to message).

Similarly, Respondents are not associated with the voices that speak through the student activity fee forum. Instead, like the landowner in *PruneYard*, they merely are required to support a viewpoint-neutral forum. Indeed, a university's primary purpose is to educate its students through providing them with diverse opportunities to acquire, disseminate and interpret information. In doing so, universities prepare students to become productive members of society. In the words of this Court:

> [t]he classroom is particularly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

In furtherance of a broad educational mandate, many universities create a forum for the exploration and presentation of many varied and often controversial political and ideological perspectives. Through such a forum, students are exposed to diverse political and ideological viewpoints. The University does not coerce these students into accepting any particular political or ideological position advocated by funded student groups. Instead, the University exposes students to controversial ideas — the quintessence of education. *See Widmar v. Vincent*, 454 U.S. 263, 278-80 (1981); *Healy v. James*, 408 U.S. 169, 181 (1972); *Keyishian*, 385 U.S. at 603.

2. *Respondents Have Not Been Compelled to Provide Financial Support For A Particular Viewpoint*

Nor have Respondents been forced to provide financial support to any particular idea, except the idea of free speech itself. The prohibition on government pressure to support a *particular* candidate or viewpoint should not be confused with support for a government effort to establish a non-discriminatory, subsidized public forum open to *all* viewpoints. It is, of course, true that the government may *not* require individuals to provide financial support to an objectionable viewpoint as a condition to retain an economic benefit or other right. *See, e.g., O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 714 (1996). A mere "association" with a public forum, however, cannot lead to a compelled affirmation of belief claim. *E.g., PruneYard*, 447 U.S. at 86-88. Likewise, compelled financial participation in a plan to subsidize a forum for all speakers on a non-discriminatory, viewpoint-neutral basis does not constitute compelled financial support for the ideas espoused by any one of the subsidized speakers.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), Congress provided viewpoint-neutral subsidies to all candidates for President. Objectors argued that the subsidy program compelled them to support the ideas of candidates with whom they disagreed. *See id.* at 92. In words that apply to the University's creation of a student public forum, this Court rejected the challenge, stating:

> Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values.

Id. at 92-93.

By parallel reasoning, the University's use of student fees to create a forum that increases opportunities for speech in a non-partisan, viewpoint-neutral manner is the type of constitutionally permissible activity that does not endanger an individual's First Amendment freedom.

Respondents ignore *PruneYard* and *Buckley*, which, like the *Southworth* decision,[9] involved mandated support for a viewpoint-neutral public forum. Instead, Respondents rely on cases where support was required for a single viewpoint. In *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), this Court construed provisions of the governing statute to require a labor union to refund to dissenting workers the *pro rata* portion of mandatory agency shop dues used to support particular political candidates. In *Abood*, this Court

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9. In fact, the court in *Southworth* incorrectly relied on dicta in *Rosenberger* to distinguish *Buckley*. This Court in *Rosenberger* noted that "[t]he neutrality of the [university's funding] program distinguishes it from a tax levied for the direct support of a church or group of churches." *Rosenberger*, 515 U.S. at 840. The court in *Southworth* apparently relied on this Court's comment that "the $14 paid each semester by students is not a general tax designed to raise revenue for the University," *id.* at 840-41, in concluding that the student fee was not a general tax, and was therefore exempted from the tenets of *Buckley*. *See Southworth*, 151 F.3d at 732 (quoting *Rosenberger*, 515 U.S. at 841). However, from this Court's comment in *Rosenberger* that "[t]his is a far cry from a general public assessment designed and effected to provide financial support for a church," *Rosenberger*, 515 U.S. at 841, it seems clear that this Court merely was distinguishing the student fee from a government-imposed tax to fund religion, and that the distinction between designated fees and taxes was not intended to create a dichotomy in the landscape of First Amendment protections.

applied First Amendment compelled speech analysis to reach the same result. In *Keller*, this Court applied *Abood* to mandatory state bar dues and required *pro rata* refunds to dissenting members of the organization for political expenditures designed to advance a particular viewpoint. *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (restricting use of compulsory union dues to activities related to contract negotiations).[10]

The key difference between *Abood* and *Keller* on the one hand, and *PruneYard*, *Buckley* and *Southworth* on the other, is that the former involved the use of members' fees to support a single, partisan political agenda to the exclusion of others, while the latter cases involved the funding of viewpoint-neutral open forums. As a dissenting judge stated in the denial of rehearing *en banc* in *Southworth*,

> [t]here is a crucial difference between a requirement to pay money to an organization that explicitly aims to subsidize one viewpoint to the exclusion of other viewpoints, as in *Abood* and *Keller*, and a requirement to pay a fee to a group that creates a viewpoint-neutral forum, as is true of the student activity fee here. The former is subject to additional First Amendment constraints and must therefore allow dissenters to opt out of the fund; the latter satisfies the First Amendment's concerns with the plurality of views inherent in its viewpoint-neutrality.

Southworth v. Grebe, 157 F.3d 1124, 1125-26 (Wood, J., dissenting), *denying reh'g en banc*, 151 F.3d 717 (7th Cir. 1998).

10. In each setting, this Court previously had upheld the requirement that all persons served by the collective or regulatory organization participate in its financial support. *See, e.g., Lathrop v. Donohue*, 367 U.S. 820 (1961) (upholding compulsory bar membership and dues); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (upholding compulsory union dues in agency shop); *see also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding requirement of financial support of generic advertising by dissenting members of government-established growers association).

Thus, the use of student fees payable to the University's student government to fund a viewpoint-neutral public forum cannot be equated with the expenditure of mandatory agency shop/bar association dues for partisan political purposes. If Respondents were to prevail, whenever a government entity supports speech, anyone compelled to contribute financially to that entity — by virtue of taxes, tuition, fees or other means — could assert a violation of the First Amendment's ban on compelled speech. Indeed, if mandatory support of a public forum were treated as compelled identification with the particular speakers who use the forum, it would become administratively impossible for government to create a public forum. Under *Abood*, financial contributors to the forum could opt out of their financial obligations whenever they disagreed with one or more of the speakers who used it.

Finally, this Court should reject the notion that compelled financial support of a viewpoint-neutral public forum can be equated with compelled financial support of the speakers who use that forum. In doing so, this Court would not weaken its historic refusal to countenance compelled speech. A coherent, interlocking set of First Amendment norms provides effective protection against unfair efforts by the state to compel support for *any* idea, without imposing disabling restrictions on collective action. In settings where a governmental unit seeks to use mandatory fees to subsidize speakers, compelled support of a particular disfavored idea is impossible because this Court has imposed a First Amendment requirement of viewpoint-neutrality that prevents the funds from being diverted exclusively to

designated partisan uses. *Rosenberger*, 515 U.S. at 829 (mandating provision of state university subsidies to religious publications on same terms as secular publications); *see also Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (deferring to public television decision to subsidize political debate involving fewer than all the candidates as long as candidates were not excluded on basis of viewpoint). On the other hand, in settings where government itself compels the speech, as in *Barnette*, or where mandatory fees are collected and disbursed to speakers on the basis of viewpoint by private organizations free from a First Amendment obligation to be viewpoint-neutral, as in *Abood* and *Keller*, dissenting individuals are entitled to a First Amendment opt-out. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991). In both settings, the First Amendment protects against compulsory support of a disfavored idea, while permitting effective collective action in support of important social goals.

II.

RESPONDENTS' INSISTENCE ON A RIGHT TO EXERCISE INDIVIDUAL VETOES OVER THE UNIVERSITY'S USE OF MANDATORY STUDENT ACTIVITY FEES IS INCONSISTENT WITH FUNDAMENTAL FIRST AMENDMENT JURISPRUDENCE

The establishment of a viewpoint-neutral public forum is irreconcilable with a right that permits an individual to refrain from indirect support of objectionable speech in that forum. If individuals may opt out of supporting a public forum, which by its very nature must be inclusive of a range of views, the ability of government to promote speech and fora for speech will be effectively eliminated. As one dissenting member of the California Supreme Court stated when that court was presented with this same question, under the opt-out approach:

> funding [would] soon devolve into a political popularity contest. Thus, in a setting where provocative ideas should receive the most support and encouragement, precisely the opposite will occur; student groups will be subject to an ideological referendum, and the most marginal groups will receive the least financial assistance. This is truly Orwellian.

Smith v. Regents of the Univ. of Cal., 844 P.2d 500, 526 (Cal. 1993) (*en banc*) (Arabian, J., dissenting).

Under this approach, a court would be required to give serious consideration to virtually any objection to the use of government funds to support programs with which a dissenter disagrees. If a compelled speech claim is to be permitted in the public forum context, then a citizen could demand a *pro rata* refund on his taxes if he disagreed with any speaker announcing his views in a park, street corner, or any governmentally subsidized arena, including advertising in a transportation facility.

This Court has, however, repeatedly rejected individual claims to opt out of the general obligations of citizenship, even in the more heavily protected arena of religious freedom.[11] Instead, this Court has recognized that, while government may not compel individuals to affirm, or appear

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11. *E.g., Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (rejecting First Amendment claim to religious exemption from minimum wage obligations); *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting First Amendment claim to selective conscientious objection to particular wars); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (rejecting First Amendment challenge to child labor laws); *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (rejecting constitutional challenge to compulsory vaccination rules); *Reynolds v. United States*, 98 U.S. 145 (1878) (rejecting First Amendment challenge to laws forbidding polygamy).

to affirm, their belief in ideas with which they disagree, the necessity of collective support to empower government to effect comprehensive programs for a variety of societal needs permits the government to impose obligations, including financial obligations, on all members of a group or entity.[12]

Respondents in effect are seeking to create a political analogue to the religion clauses of the First Amendment in their insistence on a free speech right to opt out of state-imposed financial obligations when their monies will be used to fund a broad-based program of support to organizations, some of whose ideas are offensive to Respondents' views. While it is true that the Establishment Clause prevents government from requiring citizens to expend funds in direct support of religion, *see, e.g., Everson v. Board of Educ.*, 330 U.S. 1 (1947), attempting to extend a similar "no support" principle to the expenditure of student fees to support organizations espousing ideas with which the dissenting students disagree would fail under the religion clauses. Even in that more sensitive arena of Free Exercise and Establishment Clause doctrine,[13] this Court has recognized

12. *E.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding requirement of financial support of generic advertising by dissenting members of government-established growers association); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (upholding use of compulsory union dues for union convention, publications and social functions); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting religiously based exemption from social security taxation); *Buckley v. Valeo*, 424 U.S. 1 (1976) (rejecting First Amendment objection to government financing of Presidential campaigns); *Lathrop v. Donohue*, 367 U.S. 820 (1961) (upholding compulsory bar membership and dues); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (upholding compulsory union dues in agency shop).

13. Although *amicus* is aware, in light of this Court's holdings in *Employment Div., Dep't of Human Resources of Ore. v. Smith*, (Cont'd)

that the expenditure of public funds that may benefit religious institutions as part of a general program designed to serve secular purposes does not compel taxpayers to support religious institutions in violation of the Establishment Clause. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 675-76 (1970) (upholding real property tax exemptions for churches as part of broad grant of exemption to eleemosynary institutions). Thus, in *United States v. Lee*, 455 U.S. 252 (1982), this Court rejected a Free Exercise claim to exemption from social security taxation. *Id.* at 260. The failure of the Free Exercise claim in *Lee* completely undermines Respondents' argument for a First Amendment compelled speech based exemption in this case.

Indeed, if the Seventh Circuit's decision is affirmed, this Court's precedents that have distinctly limited compelled speech claims in the context of collective group interests will be seriously eroded. In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), for example, this Court upheld a requirement of financial support from all members of a government-established growers' association to support generic advertising for the industry. *Id.* at 469-70. The *Glickman* Court rejected the claim of several large growers that they were compelled to speak, noting that the use of assessments to support collective advertising did not require them to personally affirm an objectionable message, to use their own property to convey an antagonistic ideological message, or require them to be publicly identified or associated with another's message. *Id.* at 470-71. The

(Cont'd)
494 U.S. 872 (1990), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) and *City of Boerne v. Flores*, 521 U.S. 507 (1997), that this Court's current standard of scrutiny for governmental regulations pertaining to the religion clauses is less stringent than previously applied, the cases cited in the text were decided at a time when challenges to government regulations made under the religion clauses were examined under exacting scrutiny.

Glickman Court held that "[r]espondents are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 471. If a compelled speech claim permits students to opt out of paying a mandatory student activity fee used to support a forum for the benefit of the entire group, this Court's decision in *Glickman* and other cases will be cast into doubt. *E.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (rejection of property-owner's compelled speech claim based on presence of shopping center leafletters propounding offensive messages); *Buckley v. Valeo*, 424 U.S. 1 (1976) (rejection of compelled speech claim based on government financing of Presidential campaigns).

There is also well-settled authority, particularly in the area of free speech, that circumscribes the extent to which the federal courts may engage in questions addressing the content of educational curriculum.[14] Despite this authority, the court in *Southworth* recognized a compelled speech scenario with regard to the student activity fund and applied the *Abood/Keller* line of cases to the University's funding program in order to determine whether the challenged groups' activities were "germane" to the University's purpose.

14. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263, 278-79 (1981) (Stevens, J., concurring) (stating that universities make content-based curriculum decisions on a routine basis and that "[j]udgments of this kind should be made by academicians, not by federal judges"); *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 507 (1969) (stating that "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools"); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values").

Southworth, 151 F.3d 717, 724-27, *reh'g denied en banc*, 157 F.3d 1124 (7th Cir. 1998). The circuit courts in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985) and *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) also applied *Abood* and *Keller* and engaged in a germaneness analysis with regard to funding student groups through student activity fees. Each of these circuit court decisions, in effect, left it to federal judges rather than to educators to determine whether each participant in a student forum was engaged in "political" or "educational" activities.

But the federal judiciary simply is not equipped to second-guess university administrators on the educational value of a vibrant public forum on a university campus. *See, e.g.*, *Widmar*, 454 U.S. at 278-79 (Stevens, J., concurring); *Tinker*, 393 U.S. at 507; *Epperson*, 393 U.S. at 104. The court in *Southworth* explicitly recognized that "everything is in a sense educational (organizing a student activity, engaging in political and ideological speech, even choosing which political party or candidate to fund)." *Southworth*, 151 F.3d at 725. The court in *Galda* likewise recognized the problem judges face in making this distinction, noting that:

> [a]n examination of PIRG's financial documents by a certified public accountant as well as an independent review by the district court established that it was not possible to "numerically quantify 'political' and 'educational' components of PIRG". . . .
>
> * * *
>
> Moreover, the evidence revealed that it is impossible to isolate the "educational component" from the ideological pursuits for purposes of apportioning the expenses attributable to each. It

> is difficult to believe that it could be otherwise since the educational benefits are intertwined and integrated with the political and ideological objectives. It is no simple task, and probably an impractical one, to formulate principles that could be used to separate the educational component of lobbying, campaigning, or researching a paper that urges passage of certain legislation from the organization's ideological goal which is directly advanced by those activities.

Galda, 772 F.2d at 1063, 1066.

Similarly, in *Rosenberger* this Court noted the inherent difficulties that exist in trying to find a rational distinction between "religious speech" and "speech about religion." *Rosenberger*, 515 U.S. at 845 (quoting *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981)). Although *Rosenberger* and *Widmar* both were based on the Establishment Clause, the passage cited during the *Rosenberger* Court's analysis is relevant: "[e]ven if the distinction [between 'religious speech' and 'speech about religion'] drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer." *Id.* The difficulty in drawing educational versus political distinctions in the university speech forum context, and the fact that engaging in such an exercise would involve federal courts in ongoing oversight of the content of public university education, are both strong reasons for rejecting the *Southworth* court's application of *Abood* and *Keller* to the university setting.

Indeed, if the *Southworth* decision is upheld, a flood of litigation involving public university use of student fees, and virtually every other mandatory payment to a government entity, might sweep through the courts. For example, *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), which refused to apply *Abood* and *Keller* to a Free Exercise

challenge to the use of mandatory student insurance fees that paid for student abortions, might require reexamination, as might numerous other federal court decisions that have deferred decisions concerning the use of university fees to the educational institutions. *See, e.g., Rounds v. Oregon State Bd. of Higher Educ.*, 1999 WL 86684 (9th Cir., Feb. 23, 1999) (holding that use of compulsory student fees to fund public interest research groups does not violate students' associational rights); *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 122 (5th Cir. 1992) (holding no First Amendment violation in assessing mandatory student fees to support university newspaper), *cert. denied*, 506 U.S. 1087 (1993); *Kania v. Fordham*, 702 F.2d 475, 481 (4th Cir. 1983) (upholding use of mandatory student fees to support university newspaper).

This Court has established a clear body of First Amendment jurisprudence that permits "opt-outs" only in the limited circumstances of compelled speech. Should this Court affirm the Seventh Circuit's decision to expand a dissenting individual's right to opt out to include public forums in general, the affirmance will unsettle sound and well-reasoned precedent in a variety of First Amendment contexts. In light of this Court's existing precedent and the practical consequences that would ensue from an affirmance of the Seventh Circuit's decision, *amicus* respectfully suggests that this Court not recognize a First Amendment "opt-out" right in this case.

CONCLUSION

For the above-mentioned reasons, the decision of the Court of Appeals for the Seventh Circuit below should be reversed.

Respectfully submitted,

BURT NEUBORNE
KIMANI PAUL-EMILE
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the Americas
Fifth Floor
New York, NY 10013
(212) 998-6730

SCOTT D. MAKAR
Counsel of Record
ROBERT BERGEN
MICHAEL J. FREVOLA
CAMILLE NICODEMUS
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amicus Curiae
The Brennan Center for Justice at
New York University School of Law

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, *et al.*,

Petitioners,

—v.—

SCOTT HAROLD SOUTHWORTH, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF WISCONSIN, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF PETITIONERS

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Elliot M. Mincberg
Judith E. Schaeffer
People For the American Way Foundation
2000 M Street, N.W., #400
Washington, D.C. 20036
(202) 467-4999

Jon G. Furlow
(*Counsel of Record*)
Michael, Best & Friedrich, LLP
One South Pinckney Street
Firstar Plaza, Suite 700
Madison, Wisconsin 53701
(608) 257-3501

Peter M. Koneazny
ACLU of Wisconsin Foundation
207 East Buffalo Street, #325
Milwaukee, Wisconsin 53202
(414) 272-4032

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Wilson, David A., "The Public Service Role of the State University in Changing World," in THE FUTURE OF STATE UNIVERSITIES (Leslie W. Kiepplin, *et al.*, eds. 1985) 11

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Wisconsin is one of its statewide affiliates. Since its founding in 1920, the ACLU has participated in numerous cases before this Court involving the application of First Amendment principles to state universities, both as direct counsel and as *amicus curiae*. *E.g.*, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Healy v. James*, 408 U.S. 169 (1972). This case presents those issues again, and its proper resolution is a matter of significant concern to the ACLU and its members.

People For the American Way (People For) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has more than 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases involving freedom of speech and religious liberty. People For has joined in filing this *amicus* brief to help vindicate the important free speech principle at stake in this case -- namely, that a public university does not offend the First Amendment by opera-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ting a viewpoint-neutral public forum designed to promote a "marketplace of ideas."

STATEMENT OF THE CASE

This case was brought by a group of students from the Madison campus of the University of Wisconsin (UW), who object to the University collecting a mandatory student fee, and then making a portion of it available to student organizations that engage in political or ideological activities. Although respondents stipulated below that this funding is made available to all registered student organizations (RSOs) on a viewpoint-neutral basis, Pet.App. at 106a, ¶12, they nonetheless contend that they are constitutionally entitled to opt out of a system that inevitably supports at least some organizations whose views they do not share. An understanding of the actual funding process at UW is critical to any analysis of that claim.[2]

The Student Fee System

Like many universities, both public and private, the University of Wisconsin requires its students to pay an annual fee, in addition to tuition, that is used to support a broad variety of student services and organizations. During the 1995-96 school year, the fee for each full-time student at UW was $330. The money is collected on a semester basis and deposited in a segregated fee account maintained by the University. Pursuant to Wis. Stat. §36.09, both the Board of Regents and the students have control over this segregated fee account under an arrangement commonly referred to as "shared governance."[3]

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[2] The description that follows is largely based on the a set of stipulated facts agreed to by the parties. Pet.App. at 100a-112a.

[3] The principle of shared governance is set forth in Wis. Stat. §36.09(5), (continued...)

The segregated fee is divided into two categories: allocable and nonallocable. Respondents do not challenge the nonallocable fees.[4] Likewise, respondents do not challenge that portion of the allocable fees used to fund the Child Care Tuition Assistance Program, the Wisconsin Union Directorate Distinguished Lecture Series, the third year of the recreational sports budget, and the United Council. Nor do respondents challenge that portion of the allocable fees used to fund student groups that cannot be described as either political or ideological. Respondents do contend, however, that by permitting access to the allocable fees by student groups with political or ideological viewpoints, the Regents have violated the First Amendment principle against compelled speech, even in the context of a broadly inclusive program.

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[3] (...continued)
which provides:

> The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the immediate governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

[4] Those fees are used for debt service, certain fixed operating costs, required reserves, student health services, the Wisconsin Union, the first and second year recreational sports budget, and University Health Services.

Registered Student Organizations

Any registered student organization at UW is eligible for funding from the allocable fees. The standard for becoming an RSO is content-neutral. Specifically, a student group seeking to qualify as an RSO must establish that: (a) it has a formalized structure; (b) it is not-for-profit; (c) it is composed mainly of students; (d) it is controlled and directed by students; (e) its mission is related to student life on campus; (f) it will abide by all federal, state, city, and University nondiscrimination laws and policies; (g) it will abide by the financial and other regulations specified in the Student Organization Handbook; and (h) it will register with the Student Organization Office and provide a primary contact person. There are currently more than 600 RSOs at the University of Wisconsin. There is no evidence in the record that any group has ever been denied RSO status for any reason, and certainly no evidence in the record that any group has ever been denied RSO status on a viewpoint discriminatory basis.

Access to Allocable Fees

RSOs can receive funding in three different ways. The most common route is to seek Student Government Activity Funding by applying directly to the Associated Students of Madison (ASM). As the official representative of the student body, ASM has been granted decisionmaking authority over the allocable fees under the University's system of "shared governance." *See* n.3, *supra.* Utilizing this authority, ASM awarded approximately 126 operating grants, 6 travel grants, and 57 special event grants during the 1995-96 academic year. Alternatively, those RSOs that provide direct and ongoing services to students can seek money from the General Student Services Fund, which is administered by a subcommittee of ASM known as the Student Services Finance Committee. These grants are generally larger in

amount. However, an organization that receives a grant from the General Student Services Fund cannot also receive an operating grant from the Student Government Activity Fund. Finally, the student body can itself vote to fund or defund a specific group or activity through a referendum process that is initiated by obtaining the petition signatures of five percent of the ASM members.[5]

Regardless of which funding mechanism is used, the payment process is the same. RSOs do not receive lump sum grants. Instead, the organizations must submit a requisition or other appropriate business form requesting payment for a specific expense. An employee of the Office of the Dean of Students, working with ASM, then orders the disbursement of the money. Except for membership fees paid in lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the organization itself to pay its bills. Employees of funded organizations receive their salaries or stipends via the university payroll system.

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[5] The use of a referendum process to approve or reject specific grant applications by a majority vote of the student body may well present a different and more problematic set of constitutional issues. The referendum process at UW has never been the focus of this litigation, however, and its constitutionality was not separately addressed by either court below. Under the circumstances, *amici* respectfully suggest that this case does not present a proper vehicle to address the referendum question. At a minimum, *amici* believe that this Court should not consider the constitutionality of the referendum process at UW without remanding for a fuller development of the factual record since the referendum process apparently operates in different ways at different universities. *Compare Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992)(upholding an advisory referendum), with *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986)(striking down a binding referendum).

The Proceedings Below

Respondents' motion for summary judgment was granted by the district court based on the stipulated facts submitted by the parties. Pet.App. at 78a-98a. Relying on a series of cases decided by this Court in the context of union dues and bar dues, *see, e.g., Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990), the district court held that UW's mandatory student fee represented a form of compelled speech in violation of the First Amendment. The Seventh Circuit affirmed on the same grounds,[6] and then later denied a petition for rehearing *en banc*. 157 F.3d 1124 (7th Cir. 1998). Three judges dissented from the denial of the *en banc* petition on the theory that this case, like *Rosenberger*, involved the creation of a limited public forum, and that the *Rosenberger* Court had carefully distinguished between support for a forum and support for the views expressed in that forum. *Id.* at 1125.

SUMMARY OF ARGUMENT

Four years ago in *Rosenberger*, this Court held that the University of Virginia had created a limited public forum by using its mandatory student fees to fund a large and diverse group of student organizations. The Court therefore rejected the University's claim that the funding of a student religious publication would represent an endorsement of religion in violation of the Establishment Clause. As the Court pointed out, access to a public forum does not depend on whether

[6] *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998). The Seventh Circuit cited *dicta* in *Rosenberger* referring to the "possibility" of a compelled speech claim. 151 F.3d at 722. That tentative observation, however, falls far short of supporting the decision below.

the government agrees with the speaker's message. Accordingly, the speaker's message cannot be attributed to the state merely because it takes place in a public forum.

Properly understood, this case involves a straightforward application of the identical principle, albeit viewed through the doctrinal prism of compelled speech rather than religious endorsement. Like the University of Virginia, the University of Wisconsin has used its mandatory student fees to create a limited public forum available to all registered student organizations without regard to their political affiliation or ideological viewpoint, if any. Given the existence of a limited public forum, respondents' fear that they will be falsely identified with speech that takes place in the public forum has no factual or legal merit.

Indeed, this is a much easier case than *Rosenberger* for at least two reasons. First, whatever one thinks about the merits in *Rosenberger*, the constraints imposed by the Establishment Clause on the government's ability to fund religion raise a host of issues that are simply not presented by this record.[7] Second, the university in *Rosenberger* had a far closer connection to the funded student groups than respondents can assert in this case. Here, as in *Rosenberger*, respondents' mandatory student fee is paid to the university, where it is used to create a general fund that is then made available to all eligible student organizations. If the university's direct connection to funded student groups did not create a constitutionally impermissible link in *Rosenberger*, then respondents' indirect connection to funded student

[7] Both the ACLU and People For submitted *amicus* briefs in *Rosenberger* arguing that the university's Establishment Clause concerns were valid on the facts of that case.

groups does not create a constitutionally impermissible link here.[8]

Because we believe this case is properly analyzed under the public forum doctrine, it is unnecessary to consider whether UW's decision to fund a broad array of student organizations is germane to its educational mission. As a technical matter, that issue only becomes relevant if there actually is a compelled speech violation. Nevertheless, it is worth noting that this Court has long recognized universities as the quintessential "marketplace of ideas." *See Keyishian v. Board of Regents*, 385 U.S. 589 (1967). The Wisconsin legislature has likewise recognized the importance of intellectual diversity in defining its goals for higher education in the state. Wis. Stat. §36.01. Surely, a student fee system that facilitates debate on a wide range of topics fits easily within the educational mission of a university.

Finally, unlike a genuine compelled speech case, respondents have no right to a rebate on whatever relatively small portion of their mandatory fee is actually used to support the political and ideological groups they have identified as objectionable. In the factual context of this case, respondents are in the same position as taxpayers who object to the use of a municipal park for a controversial political rally. They can certainly make their objection known, and even use the forum as their vehicle for doing so, but they may not express their displeasure by withholding taxes. Moreover, if the effect of a rebate procedure were to reduce the level of funding available to unpopular groups participating in an otherwise public forum, the rebate procedure itself would constitute a form of viewpoint discrimination in violation of the First Amendment.

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[8] The opposite is equally true. If the Court were now to determine that the more attenuated link here is sufficient to support a compelled speech claim, then *Rosenberger* must be reexamined and reversed.

ARGUMENT

I. THE STUDENT ACTIVITY FUND CREATED BY UW IS A LIMITED PUBLIC FORUM THAT PROVIDES FINANCIAL SUPPORT TO ELIGIBLE STUDENT GROUPS ON A VIEWPOINT NEUTRAL BASIS

According to the Seventh Circuit, this case presents a "very limited constitutional question." 151 F.3d at 722. The court of appeals defined that question as "whether the Regents can force objecting students to fund private organizations which engage in political and ideological activities, speech and advocacy." *Id.* If that were actually the question presented by this case, we might well agree with the panel's conclusion. In our view however, the threshold question that needs to be resolved is whether UW has created a limited public forum by using mandatory student fees to fund eligible student organizations on a viewpoint-neutral basis. *Rosenberger* leaves little doubt that the answer to that question must be yes. The Seventh Circuit thus reached the wrong conclusion because it asked the wrong question.

For purposes of this case, the student activity fund in *Rosenberger* and the student activity fund at UW are functionally indistinguishable. Both funds are supported by mandatory student fees assessed in addition to tuition. Both funds use neutral criteria to determine funding eligibility. And both funds subsidize a broad array of student groups engaged in a wide variety of expressive activities, including political and ideological speech. If public forum analysis was appropriate in *Rosenberger*, it is at least equally appropriate here.

That conclusion is unaffected by the fact that UW has created what *Rosenberger* described as "a forum more in a metaphysical than in a spatial or geographic sense." 515 U.S. at 830. The same was true in *Rosenberger* itself. *See*

also National Endowment for the Arts v. Finley, 524 U.S. 569, __, 118 S.Ct. 2168, 2178 (1998)(acknowledging that government funding programs can qualify as public forums if they are made generally available to eligible applicants). What is far more significant is that UW has used its student activity fees in a manner that faithfully reflects the University's "broad mission" to provide educational opportunities for all its students in furtherance of "the search for knowledge and individual development." Wis. Stat. §36.01.

Like the student groups in *Rosenberger*, registered student organizations at UW are a key component of the university's educational mission and serve important educational goals. As the Student Handbook notes: "The University gains or loses directly by the quality of [RSO] programs, the skill of [RSO] leadership, and the success [RSOs] have in reaching large numbers of students." *See* Preface to Student Handbook (Dean's Letter).[9] This observation, in turn, reflects the University's recognition that "[i]n a student organization, [students] can develop and enhance [their] leadership skills and [their] ability to function cooperatively as part of an organization -- skills that will be necessary throughout your life and especially as you begin your career." Student Handbook, at 4.

Most universities, including UW, therefore encourage broad participation in student organizations. At UW, this is part of the "second curriculum." *See* Preface to Student Handbook. That educational choice, however, has constitutional consequences. Once university facilities are made generally available to student organizations, those facilities constitute a limited public forum that cannot be selectively denied to particular groups because of the content of their speech, absent a compelling justification. *See, e.g., Widmar*

[9] The 1996-97 Student Handbook is part of the record in this case.

v. Vincent, 454 U.S. 263 (1981). According to the Court's decision in *Rosenberger*, the same principle applies to university programs designed to fund private speech. Indeed, the notion of a public forum as a "marketplace of ideas" has particular resonance in the university setting:

> The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." *United States v. Associated Press*, 52 F.Supp. 362, 372.

Keyishian v. Board of Regents, 385 U.S. at 603; *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)("No one should underestimate the vital role in a democracy that is played by those who guide and train our youth").

This Court has long understood that the metaphor of education as a "marketplace of ideas" is "not confined to the supervised and ordained discussion which takes place in the classroom." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512-13 (1969). It also includes "personal intercommunication among students," which "is not only an inevitable part of the process of attending school; it is also an important part of the educational process." *Id.* This is especially true in the university setting where students have the opportunity to "actively shap[e] their collegiate and social environments with these environments simultaneously providing the potential for transforming the individual." Eric L. Dey & Sylvia Hurtado, "College Students in Changing Contexts," in HIGHER EDUCATION IN AMERICAN SOCIETY at 249, 250 (3d ed. 1994). Part of the "role of the university [is] as a neutral ground where the clash of ideas is unfettered." David A. Wilson, "The Public Service Role of the State University in a Changing World,"

in THE FUTURE OF STATE UNIVERSITIES at 85 (Leslie W. Kiepplin, *et al.*, eds. 1985).

Accordingly, this case cannot be decided, as the Seventh Circuit suggested, by pointing to the principle that student groups have no entitlement to funding because the government is not required to subsidize speech. 151 F.3d at 721. While that statement may be true as a general matter, *see, e.g., Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983), it has no application in this case where the Regents have already decided that the university's educational objectives would be enhanced by creating a viewpoint-neutral subsidy for student speech. The question is not whether a government decision to deny funding can be challenged, but whether a government decision to grant funding can be challenged. The distinction matters, particularly here where the government has chosen to make funding available on a viewpoint-neutral basis.

The success of the Regents' educational choice to promote the expression of multiple views through the creation of a public forum is demonstrated by the factual record, which shows that more than 600 RSOs currently operate at the University of Wisconsin. These student groups range in subject matter from the philosophical (*e.g.*, Students of Objectivism), to the political (*e.g.*, Campus Coalition for Israel), to the conservative (*e.g.*, Federalist Society), to the liberal (*e.g.*, UW Greens), to the socialist (*e.g.*, International Socialist Organization), to the apparently apolitical (*e.g.*, Badger Crops Club). As this Court emphasized in *Rosenberger*, "[t]he quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment." 515 U.S. at 836.

Given the expansive nature of the funded student activity at UW, the Seventh Circuit's reliance on *Abood* and *Keller* was fundamentally misplaced. Unlike this case,

neither *Abood* nor *Keller* involved a limited public forum. In *Abood*, the Court held that a nonunion member has a right to insist that the union not use his mandatory agency shop fees to subsidize "ideological causes," even if those causes are supported by a majority of the union membership, unless they are "germane" to the union's responsibilities as collective bargaining agent. 431 U.S. at 235. In *Keller*, the Court held that lawyers in California, who are required by statute to join the state bar, have a right to insist that their mandatory bar dues not be used to endorse legislative initiatives, even if those initiatives are favored by a majority of the bar's membership, unless they are "germane" to the bar's designated role in regulating the profession and improving the quality of legal services. 496 U.S. at 13-14.

Amici support both those holdings, but neither decision is controlling here. Rather, those cases stand for the proposition that individuals cannot be compelled to endorse the political views of membership organizations that the state has forced them to join or support for other, unrelated reasons. In this case, respondents are not being asked to join any organization or endorse any political views. *See Rounds v. Oregon State Bd. of Education*, 166 F.3d 1032, 1037 (9th Cir. 1999)(rejecting a compelled speech challenge analogous to the one raised by respondents in this case). They are simply being required to contribute to the maintenance of a public forum at UW that is available to all students, including respondents, on an equal basis.

Of course, recognizing the right of the Regents to create a limited public forum at UW does not insulate the operation of that forum from First Amendment review. The principle that any public forum must be administered in a viewpoint-neutral manner applies to universities as well as other government agencies. For example, in *Healy v. James*, 408 U.S. 169, this Court ruled that the First Amendment had been violated when a local chapter of the Students

for a Democratic Society (SDS) was denied official recognition and access to university facilities by Central Connecticut State College. More recently, this Court ruled in *Rosenberger* that the University of Virginia had violated the First Amendment by refusing to fund a student religious publication.

This case does not raise such problems because there is no claim of viewpoint discrimination. To the contrary, respondents have stipulated that "the process for reviewing and approving allocations for funding [at UW] is administered in a viewpoint neutral fashion."[10] That concession is critical.

II. THE EXISTENCE OF A LIMITED PUBLIC FORUM DEFEATS RESPONDENTS' COMPELLED SPEECH CLAIM

A. Respondents' Compelled Speech Claim Depends On A Showing That They Have Been Forced To Associate With Political Views They Do Not Share

Compelled speech violates the principle of individual conscience that is central to the First Amendment. But there is no violation of individual conscience unless the state has actually compelled someone to show support for a particular message through word or action. The classic compelled speech case is *West Virginia State Bd. of Educ. v. Barnette*,

[10] This is not to say that a viewpoint discrimination case could not be made out on different facts. It is always possible that funding decisions might be improperly manipulated so that less popular student groups, or student groups with a minority political or ideological view, receive lower levels of funding, or no funding at all. *Cf. Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995). The present case, however, does not raise any "as applied" challenge.

319 U. S. 624 (1943), where the Court held that West Virginia could not require its elementary school students to salute the flag and recite the pledge of allegiance. The compulsion to speak and act in *Barnette* was directly enforced by the state: nonconforming students were subject to expulsion; their parents were subject to imprisonment and fine. *Id.* at 629. Similarly, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court struck down a New Hampshire statute that prohibited motorists from obscuring the motto, "Live Free or Die," on the state license plate. Like *Barnette*, the link in *Wooley* between the individual and the prescribed state message was direct and unmistakable.[11]

That has been true, as well, in this Court's other compelled speech cases. *See, e.g., Torcaso v. Watkins*, 367 U.S. 488 (1961)(holding that public officeholders cannot be compelled to declare their belief in God); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)(holding that newspaper cannot be compelled to provide a right of reply to candidates it has criticized); *Elrod v. Burns*, 427 U.S. 347 (1976)(holding that sheriff's employees cannot be compelled to support sheriff's political party); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986) (holding that utility company cannot be compelled to include message from opposition group in utility's billing envelope).

Conversely, the Court has refused to uphold a compelled speech claim when the connection between the complaining individual and the prescribed state message is neither explicit nor reasonably inferred. For example, in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980),

[11] The dissenters in *Wooley* agreed on the governing principle but disagreed on its application to the facts of that case. 430 U.S. at 721-22 (Rehnquist, J., dissenting).

a shopping center owner denied student leafletters access to the shopping center to distribute political pamphlets and collect petition signatures. When the students sued for access, the shopping center cited *Wooley* in support of its contention that any order requiring it to make its facilities available to the students for their expressive activities would amount to a form of compelled speech. This Court rejected that claim, finding the asserted connection between the shopping center and the students' speech too attenuated. The Court pointed to three factors that distinguished *Pruneyard* from *Wooley* and *Barnette*: first, because the shopping center was considered a public forum under California law, it was unlikely that the views expressed by the leafletters would be attributed to the shopping center; second, the state was not promoting or discouraging any particular viewpoint; and third, the shopping center was free to disavow the leafletters' views. While respondents' compelled speech claim arises in a different context, the factors highlighted in *Pruneyard* also make this case distinguishable from the compelled speech cases relied on by the Seventh Circuit.

B. The Viewpoint-Neutral Forum Established By UW Does Not Create Any Real Or Perceived Link Between Respondents And The Messages Delivered By Other Private Speakers Using The Forum

As in *Pruneyard*, the university's decision to maintain a public forum effectively severs any link between respondents and the speech they challenge in this case. If the private religious speech of university students is not attributable to the university, even when it occurs in a public forum that the university itself has created and funded, *see Rosenberger*, then it is implausible to argue that the private political speech of student groups at UW will be attributed to re-

spondents merely because respondents' student fee helped support the public forum where that speech takes place.

Widmar v. Vincent, 454 U.S. 263, provides a useful guidepost. Although the plaintiffs in *Widmar* raised an affirmative speech claim, as opposed to the compelled speech claim raised by respondents here, this Court's summary of the governing legal principles is instructive:

> First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.
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> Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC.

Id. at 274 (citation omitted). *See also Capitol Square Review and Advisory v. Pinette*, 515 U.S. at 763.

Rosenberger demonstrates the power of this principle in the student fee context. As described by the Court, "[t]he object" of the student activity fee was "to open a forum for speech and to support various student enterprises." 515 U.S. at 840. Thus, the Court reasoned, the university did not advance or otherwise endorse the message of a religious publication that participated in the forum on the same basis as all other student organizations.[12] The logic of that holding is

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[12] *Rosenberger* reserved judgment about whether direct funding of a reli- (continued...)

irreconcilable with respondents' claim here.

The error of the Seventh Circuit was to look to *Abood* and *Keller* for guidance without first considering the legal significance of the Regents' decision to create a public forum, and how that decision affected respondents' compelled speech claim.[13] Unlike student fees used to create a limited public forum in a university setting, *see Rosenberger*, mandatory dues paid to the union (in *Abood)* or the state bar (in *Keller*) are not made available equally to support all viewpoints; instead, they are used systematically for the intended purpose of advancing one viewpoint over another. Unlike the university context where the student activity fee supports a variety of speakers expressing multiple views on disparate subjects, the speech produced by union and bar dues is narrowly focused and directly associates the dues paying member with a singular and partisan message ostensibly delivered on his or her behalf.

The distinction is critical. As the Court explained in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 471 (1997):

> *Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief."

This interpretation of *Abood* only further underscores respondents' failure to establish how their "freedom of belief" is abridged by the political and ideological speech of student groups at UW that do not purport to represent respondents' views, and whose entitlement to university funds is determined on the same viewpoint-neutral basis as every other registered student organization.

A majority of lower courts to address the issue of mandatory student fees have recognized this flaw, and have rejected a compelled speech claim in this context precisely because the argument presumes a logical connection that the facts do not support. For example, in *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993), the court of appeals held that the use of mandatory student fees to fund the student newspaper at Southwest Texas State College did not violate the principle against compelled speech so long as "[t]he University provided the students with the funds needed for the students themselves to engage in debate and did not force ideological conformity." Similarly, in *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983), the court of appeals stressed that the student fees assessed by the University of North Carolina for the "Daily Tar Heel" enhance speech generally by "increas[ing] the overall exchange of information, ideas, and opinions on the campus." In *Lace v. University of Vermont*, 131 Vt. 170, 176-77, 303 A.2d 475, 479 (Sup.Ct.

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[12] (...continued)
gious organization would violate the Establishment Clause and, thus, tip the balance in favor of prohibiting religious groups from participating in the university's program. That issue is not raised in this case, but could properly be raised in a future "as applied" challenge to any proposed funding of a religious organization.

[13] The California Supreme Court made the same error in *Smith v. Regents of the University of California*, 4 Cal.4th 843, 844 P.2d 500 (Sup. Ct.), *cert. denied*, 510 U.S. 863 (1993), by assuming without discussion that the mandatory student fees were linked directly to the challenged speech rather than supporting a public forum on a viewpoint-neutral basis. The only public forum discussion contained in the majority opinion in *Smith* concluded, unsurprisingly, that the funded student groups were not themselves public forums.

1973), the Vermont Supreme Court analogized a university's student activity fund to a "speaker's corner" because it provides "the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community." In *Good v. Associated Students of the University of Washington*, 86 Wash.2d 94, 542 P.2d 762 (Sup.Ct. 1975)(*en banc*), the Washington Supreme Court recognized that the collection of mandatory student fees is appropriate so long as they are not used to promote one viewpoint over another. *Accord Arrington v. Taylor*, 380 F.Supp. 1348, 1363-64 (M.D.N.C. 1974), *aff'd without opinion*, 526 F.2d 587 (5th Cir. 1975); *Veed v. Schwartzkopf*, 353 F.Supp. 149, 152 (D.Neb.), *aff'd without opinion*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

Respondents can point to no First Amendment precedent that allows political or ideological speech in a public forum to be singled out for less than equal treatment. Traditional First Amendment rules point in precisely the opposite direction. Even *Abood* and *Keller* permit the use of mandatory fees for political purposes so long as those political purposes satisfy the germaneness standard. And while the germaneness standard has never been imposed as a restriction on the use of a public forum, its application to the facts of this case leads to the same conclusion. The mandatory student fees charged by UW have helped to promote a core educational function identified by the state legislature, *see* p.10, *supra*, by promoting the creation of a "marketplace of ideas" that has become an integral part of university life.

III. AN OPT-OUT SYSTEM IS UNNECESSARY AND IMPROPER IN A LIMITED PUBLIC FORUM WHERE THE STUDENT FEES SUPPORT THE FORUM, NOT THE SPEECH IN THE FORUM

It is respondents' request to withhold a portion of their student fees that jeopardizes core First Amendment values by using the unpopularity of certain groups as an excuse to reduce the resources that would otherwise be available to support divergent viewpoints on the university campus. If respondents' fees were not withheld from the student activity fund in general, but were instead subtracted from the grants paid to student groups that respondents had identified as objectionable, those First Amendment problems would be magnified still further.

As this Court observed in *Healy v. James:*

> [T]he Constitution's protection is not limited to direct interference with fundamental rights . . . [The] possible ability [of SDS] to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

408 U.S. at 183 (citation omitted). Applying the same principle in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Court struck down an ordinance that penalized controversial groups by making the cost of a parade permit depend on the likelihood of a counterdemonstration. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a

hostile mob." *Id.* at 134-35.

This Court has recognized that an opt-out system can be an appropriate remedy in a true compelled speech case. *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). But an opt-out system is an inappropriate response to public discontent with unpopular speech in a public forum. Under those circumstances, an opt-out procedure becomes equivalent to a financial "heckler's veto." Instead of increasing the cost for unpopular groups seeking to exercise their First Amendment rights, as in *Forsyth County*, it would diminish the resources available to defray those costs. Either result is impermissible.

Permitting a refund or opt-out from the Regents' pursuit of their legislatively mandated mission would be akin to allowing taxpayers to refuse to participate in government-sponsored programs. As Justice Powell explained in *Abood*:

> Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

431 U.S. at 259 n.13 (Powell, J., concurring).

That principle was also recognized in *Keller*, where the specialized function of the state bar was specifically distinguished from the role of a typical government agency:

> [T]he very specialized characteristics of the State Bar of California . . . distinguish it from the role of a typical government official or agency. Government officials are expected as a part of the democratic process to represent and to espouse the views of the majority of their constituents . . . . If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.
>
> * * * * *
>
> The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers.

496 U.S. at 12-13 (citations omitted).

Unlike the state bar in *Keller* or the union in *Abood*, the Board of Regents is a state agency that broadly represents the interests of Wisconsin citizens. In the absence of a compelled speech claim, an opt-out is unnecessary. And, given the existence of a public forum, an opt-out would raise its own serious constitutional problems by converting a viewpoint-neutral forum into a one that is viewpoint discriminatory, thereby opening the door to future challenges that pose an even more direct threat to principles of academic freedom, as the dissent below recognized. 157 F.3d at 1128.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

Jon G. Furlow
(Counsel of Record)
Michael, Best & Friedrich, LLP
One South Pinckney Street
Firstar Plaza, Suite 700
Madison, Wisconsin 53701
(608) 257-3501

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Peter M. Koneazny
ACLU of Wisconsin Foundation
207 East Buffalo, #325
Milwaukee, Wisconsin 53202
(414) 272-4032

Elliot M. Mincberg
Judith E. Schaeffer
People For the American Way Foundation
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

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No. 98-1189

In The

Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICUS BRIEF BY NATIONAL LEGAL AID DEFENDERS ASSOCIATION, STUDENT LEGAL SERVICES SECTION, IN SUPPORT OF PETITIONERS

NED R. JAECKLE*
University of Colorado
Student Legal Services

PAMARAH GERACE
North Carolina State University
University Student Legal Services

KATHLEEN A. CUSHING
Portland State University
Student Legal Services

National Legal Aid and Defender Association
Student Legal Services Section
219 19th Avenue South
160 West Bank Union
Minneapolis, Minnesota 55455
(612) 624-1001

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20PP

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae is a national organization for legal services programs that serve students in institutions of higher education. We file this brief in support of the University of Wisconsin's position. We contend that the First Amendment allows the University to fund student groups and services through a mandatory fee in order to aid its students, create an educational environment for the expression of diverse viewpoints, and foster vigorous debate.

Amicus has a substantial interest in the issues raised by this case. Student activity fees that are collected and disbursed in the same manner as the method challenged in this case fund the programs that comprise the *Amicus*. In addition, many member organizations provide legal counsel and other assistance to the types of student groups that are recipients of student fees. These client groups would be adversely affected by the relief sought by the Respondents in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

---

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Stat. § 36.01(2) provides:

> The mission of the [University of Wisconsin] system is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. Basic to every purpose of the system is the search for truth.

ARGUMENT

I. COMPELLED FUNDING OF SERVICES AND OF A LIMITED PUBLIC FORUM IN A UNIVERSITY SETTING FACILITATES CONNECTIONS BETWEEN LEARNING AND AN EMPOWERED CITIZENRY.

Universities have long fostered exposure to and respect for diverse viewpoints in the students they admit. Traditionally institutions of higher education favored theoretical learning and classroom discourse, leaving practical application to others. Modern Universities, however, have mirrored the views of such consummate learners as Aristotle[2] and Thomas Jefferson[3] in the view that:

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[2] A. Oldfield, Citizenship and Community: Civic Republicanism and the Modern World, *in The Citizenship Debates, A Reader* 75 (G. Shafir, ed. 1998), discussing Aristotle's description of the necessary elements of a political system, "Even empowerment and opportunity together are not sufficient for the practice of citizenship". . . . The solution is education. Citizens are learners all their lives and education . . . for willing engagement in the practice of citizenship never ceases." *Id.* at 87.

[3] "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom, and happiness." Letter from Thomas Jefferson to George Wythe (Paris, Aug. 13, 1786). Jefferson, while objecting to compelled monetary contribution of an opinion that the contributor believes to be repugnant, also helped establish the University of Virginia. The University of Virginia's mission statement still refers to Jefferson in stating its central purpose of "enriching the mind by stimulating and sustaining a spirit of free inquiry. . . . [In] seeking the ablest and most promising students . . . " and in keeping with the intentions of Thomas Jefferson, "[the University seeks to] attend to [students'] total development and well-being; and to provide adequate intellectual, athletic, and social programs." *http://www.virginia.edu.*

> [Universities] must move beyond abstract notions of citizenship if [they] are to make a strong case about connections between . . . learning and an empowered citizenry. . . . [And the focus should be on] three general areas: intellectual understanding, communication and public problem solving, and the development of civic attitudes of judgment and imagination.[4]

Others have argued persuasively that the disbursement of mandatory fees to certain student groups creates a limited public forum in university settings. We concur with the Petitioner's analysis and application of this concept in the present case. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

The courts have indicated time and time again that it is the universities that have been given the power and authority to determine the educational philosophy in the university community. This determination is reflected in the mandatory student fee cases. *See Veed v. Schwartzkopf*, 353 F. Supp. 149, 153 (D.Neb.) *affd. mem.*, 478 F.2d 1407 (8th Cir. 1973) ("Our states, through their colleges and universities, must retain the freedom and flexibility to put before their students a broad range of ideas in a variety of contexts. The wisdom or political desirability of the specific route chosen is not a question to be determined by the courts.") The court allows that "(w)ithin wide limitations a state (university) is free to adopt such educational philosophy as it chooses."); *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d

[4] R. Battistoni, Service Learning as Civic Learning *in Education For Citizenship; Ideas and Innovations in Political Learning* 31 (G. Reeher & Joseph Cammarano eds. 1997).

568, 570 (1973) ("The University officials determined, as they had a right to do, that additional services and facilities were essential to the creation of a better educational environment" and that students benefited from "the acquisition, understanding, and interpreting of knowledge [which] could be facilitated by the study of controversial positions."); *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475, 479, 480 (1973) (The court pointed out that "the county court ordered the trustees of the university to determine what in their judgment, would contribute in the greatest degree to the educational, cultural, social, and recreational activities and functions of the university campus community."); *Arrington v. Taylor*, 380 F. Supp. 1348, 1363 (M.D.N.C. 1974) *aff'd. mem.*, 526 F.2d 587 (4th Cir. 1975) (the court indicates that a school newspaper as well as a speaker's program "provid(e) a forum whereby differing views on controversial subjects are presented. The resulting stimulant to student participation and discussion is at the core of the educational process." *Good v. Associated Students of Univ. of Washington*, 86 Wash.2d 94, 104, 542 P.2d 762 (1975) (The court further held that the student's first amendment rights must be balanced against the "traditional need and desirability of the university to provide an atmosphere of learning, debate, dissent and controversy."); *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) (The court stated that exposure to diverse opinions "was a vital part of the university's educational mission germane to the university's educational institution and that financing it is germane to the University's duties as an educational institution."); *Rosenberger*, 515 U.S. 931 ("The extraction here, by contrast, is a student activity fee designed to

reflect the reality in student life in its many dimensions includes the necessity of wide-ranging speech, inquiry and that student expression is an integral part of the University mission."); Finally, the dissenting opinion from a denial of rehearing *en banc* in *Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) indicates that "[T]o impede the ability of public universities to fund student groups that represent a wide range of viewpoints," would, in the Justices' minds have a direct impact "on the expression of ideas [that] would undermine the educational mission of those universities."

II. STUDENT PROGRAMS AND SERVICES ARE FUNDED ON CONTENT-NEUTRAL BASES AND ARE NOT CO-OPTED BY ANY ONE POLITICAL OR RELIGIOUS VIEWPOINT DUE TO THE DIVERSITY OF THEIR REPRESENTED STUDENT POPULATION AND DEMOCRATIC SYSTEM OF ALLOCATING FUNDS.

The latest court action in the longsuffering *Smith*[5] case is an appeal from the remand of that earlier 1993 decision. In *Smith v. the Regents of the University of California*, 56 Cal.App.4th 979, 65 Cal.Rptr.2d 813 (1997) the court decided the issue of whether or not mandatory student fees could be used to support political activities of the student government on campus. In contrast to the earlier *Smith* decision, the court held that the state did meet its burden to show a compelling state interest, having demonstrated sufficient educational value in the student's exposure to "government training, conflict

[5] 844 P.2d 500 (Cal. 1993).

resolution, exposure to diverse ideas and in the engagement in matters dealing with controversy." With reasoning similar to the dissent in *Southworth*, the court found that the primary responsibility of student government, as exercised in *Smith*, was to administer student government, not to advocate particular political or ideological views. They further found that the campus forum would allow for "vigorous discussion on matters of campus and public concern." The court also referenced the student fee cases already cited and indicated that the "fostering of energetic debate and the free exchange of views, especially in the university setting" is a long recognized special concern of the First Amendment. The court contrasts with the earlier *Smith* decision by finding that the "campus as a whole becomes the forum, a marketplace of ideas," rather than focusing on individual student activity groups.

In the present case, the parties agree that the funding from student fees creates such a limited public forum, and the objecting students agree that this forum is available for their use and the expression of their own viewpoints. Indeed, many of these same students are members of groups funded by the mandatory fee. But the critical issue here is whether a forum of services and organizations such as the one allowed by the University of Wisconsin's student fees will be extinguished by the political labeling by individual students who already had an opportunity in democratic fashion to elect student leaders who could limit or defund groups and services by using content neutral criteria.

The PIRG student groups in many universities have been particularly scrutinized. Most courts distinguish

between PIRGs that successfully educate the student population without overly politicizing the issues they research, such as in *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1932 (CA9 1999), and those PIRGs that are funded separately and that confer automatic membership in their group to each funding student. This latter type of PIRG has been required to modify their process, often resulting in a favorable change in the outcome of subsequent proceedings. *See, Carroll v. Blinken* 957 F.3d 122 (2d Cir. 1994).

The holdings at both the state and federal level in the mandatory student fee cases have accepted the value of a diversity of choice among student groups, services, and activities on campus because it serves the long standing educational mission of universities. *See Veed*, 353 F. Supp. 149, 152 (mandatory student fees being used for the school newspaper, the operation of the students' association (private attorney fees, attendance at national conferences and student salaries), and the speakers' program were not constitutionally prohibited absent a showing that the university was attempting to support or advance any particular political or personal philosophy. The "educational philosophy" of the university extends beyond the classroom to "extracurricular opportunities for the students to be exposed to speakers outside the classroom who may express widely divergent opinions on a number of topics."); *Larson*, 204 N.W.2d 568, 570 (mandatory student fees being used for the school newspaper, the operation of the student association (a "strike" against foreign policy, a conference on human sexuality, and a birth

control handbook), and the speakers' program were permissible as long as it did not appear that only one political point of view was supported by the fees. The voices heard were not attributable to the school or to the individual students suing. The University determined that "the acquisition, understanding, and interpreting of knowledge could be facilitated by the study of controversial positions . . . " and that it was appropriate that students be exposed to different points of view); *Lace*, 131 Vt. 170, 174 (students contesting the use of their mandatory student fee for the school newspaper, the purchase of certain films, defraying the costs for the student association president attending a national student conference, and the speakers' program failed to show that they were prevented from making their own views known or were denied equal and proportionate access to the same student association funds in order to present views with which they do agree. The "student association funds provide the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community."); *Arrington*, 380 F. Supp. 1348, 1362-3 (mandatory student fees were allowed to support the school newspaper because the newspaper's position on any given subject was attributable only to who controlled its content at any given time and not to the student body, the plaintiffs or the university. The paper should be considered a vehicle to express diverse "views on a variety of issues," open to all, no matter their views.); *Good*, 86 Wash.2d 94, 105 (mandatory student fees that support the operation of the student association, which took various controversial public positions (People's Park and the Vietnam War), and that also supported

a controversial speakers' program, would not be in violation of the students' associational rights if it was not a vehicle for one particular viewpoint, be it political, social, economic or religious. The court very realistically pointed out that upon enrollment in a University, the student "enters an academic community-world which allows the teaching, advocacy and dissemination of an infinite range of ideas, theories and beliefs. They may be controversial or traditional, radical or conformist. But the University is the arena in which accepted, discounted – even repugnant – beliefs, opinions and ideas challenge each other."); *Kania*, 702 F.2d 475, 477 480 (The student newspaper was rightfully receiving mandatory student fees because it increased the overall exchange of information, ideas, and opinions on campus by exposing the "student body to various points of view on significant issues, and [allows] students to express themselves on those issues".); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. den.*, 506 U.S. 1087 (1993) (mandatory student fees used for the school newspaper were allowed in that the university's educational goals were "sufficiently weighty to justify the university subsidy of a student run newspaper" in light of the fact that there was no promotion of one particular viewpoint through the use of that subsidy).

Finally, in the *Southworth* dissent from the denial of the *en banc* hearing, the court held that "[t]he burden on the objecting students' speech is lessened by the availability of the same fund to present opposing speech. The activity funds are available to a wide myriad of student groups." The dues support multiple viewpoints where the same funds are available for others to express their

disagreement; the burden on speech is minimal. Because the membership of the student association changes quickly, so does the composition and voice of the student. The students have every opportunity to participate in the electoral process.

III. LIMITED PUBLIC FORA CREATED AT MANY PUBLIC UNIVERSITIES DO NOT COMPEL OFFENSIVE ASSOCIATIONAL SPEECH, AS THE CONNECTION IS TOO TENUOUS BETWEEN THE ASSOCIATIONAL CHALLENGE AND THE FREE SPEECH AFFORDED BY THE FORUM.

A common theme throughout the various state and federal court holdings is that one group choosing to exercise its right to free speech on campus in no way speaks for everyone on campus nor does the group speaking prevent others from similarly speaking. *See Veed*, 353 F. Supp. 149, 152 (The court held that the students were "free to associate themselves with the political, religious and personal philosophies, which most closely conformed to their own." There were neither "prior restraints" placed on the student in the exercise of his constitutional rights nor were there any "sanctions" imposed for the rights he had chosen to exercise. The student is free to express his own views and positions.); The court in *Lace*, 131 Vt. 170, 174 reiterated the equal access argument and went further to indicate that there was no showing that the "university has taken any action to forbid the making of their views known to others in the campus community through the use of speech, press, films and association." The court in *Good*, 86 Wash.2d 94,

104-105 went one step further by stating that the withholding of "minimal financial contributions required [that] we permit a possible minority view [to] destroy or cripple a valuable learning adjunct of the university life." *Arrington*, 380 F. Supp 1348, 1362 indicated that the positions in the school newspaper on any given subject were not attributable to the students. The court looked at the newspaper as a vehicle for the students to "complement their classroom education by exposing the student body to various points of view on significant issues while also allowing students to express themselves on those issues." The court in *Kania*, 702 F.2d 475, 477 found that there were various avenues for expressing disagreement with the school newspaper-letters to the editor, joining the newspaper staff or joining or communicating with one of the other school newspapers.

The dissenting opinion from the *Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) denial of *en banc* hearing made it very clear that there was a great distinction between compelled funding of the *speaker* and compelled funding of the entity that merely creates the *forum*. In the former situation the speech is attributed to the payer of the fees; in the latter it is not. The money is being paid to student government to fund its own operations and to disburse to over 100 student groups with varied viewpoints. Since the speech of the student groups is not attributed to the student government, it cannot be attributed to the students that pay the fee. *Id at* 1125. Further, the student government had not aligned itself with any one political or ideological viewpoint. *Id* at 1126. Finally, the court warns that "in the end, grafting dissenters

rights into a neutral forum for expression of a full panoply of viewpoints will most likely eliminate the forum altogether which is a perverse way indeed to safeguard the kind of free and open political and intellectual debate that lies at the heart of the first amendment" and that is especially important in the University setting. *Id* 1129

PruneYard Shopping Center v. Robins[6] is more analogous to the current case than either *Abood*[7] or *Keller*.[8] First, *Southworth* involves a limited public forum that closely resembles the *PruneYard* forum. Both of these fora have a primary purpose but are open to anyone who enters each forum to take advantage of the resources or services that are offered by each. In contrast, *Keller* concerned an integrated state bar association, which represented its members as a whole with a particular political viewpoint to which some members did not have a way of giving alternative responses. Similarly, in *Abood*, the union acted as the representative and spokesperson of its members, not as a forum for the exchange of varying ideas in which any person was able to participate.

Second, any associational ties between the complaining students in the present case, who claim violation of their rights, and the speaker(s) in the forum funded by student fees are tenuous. The Court in *PruneYard* ruled that the shopping center was open to all members of the public, so any views expressed by members of the public

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[6] 447 U.S. 74 (1980).

[7] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[8] *Keller v. State Bar of California*, 496 U.S. 1 (1990).

in passing out pamphlets or seeking signatures for petitions were not likely to be identified with those of the owner.[9] Likewise, in *Southworth*, it is not reasonable to attribute the ideas and statements of the many student organizations that receive funding to any particular student, when the organizations admittedly represent a variety of activities and attitudes.

Third, the opposing views of students can be expressed. In *PruneYard*, the court felt that forcing the owner of the shopping center to allow public members to pass out pamphlets did not violate his freedom of speech, because he was free to post signs disavowing any connection or belief in the views being expressed. In the present case, students who do not agree with the messages of a particular student group are free to express their opposition – by joining a different student group that advocates another position, writing an article to the school paper, or even posting signs around campus disagreeing with the student organization's acts or views. In *Abood* and *Keller*, the members of each of those organizations had no alternative means to express their opposition. The groups involved in those cases, the state bar association in *Keller* and the teachers' union in *Abood*, represented the view for the entire membership and members who did not agree with that view could not easily disassociate themselves.

Finally, *PruneYard* is more applicable to the current case, than the union or bar association cases because the fact situations are more similar than those in *Abood* and

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[9] *PruneYard*, 447 at 87.

Keller. The owner of the shopping center in *PruneYard* was implicitly required to fund the limited public forum, because he could not deny the public members the right to petition for signatures. Similarly, here the students are required to pay mandatory student fees, which are used to fund the various student organizations that make up this limited public forum. In both *Keller* and *Abood*, while the members did pay mandatory fees, those fees did not go toward creating a forum for many differing viewpoints; they went toward certain specific political activities.

In *Rounds*, as well, the Court affirmed that:

> The goals of the university are much broader than the goals of a labor union or a state bar, and they are inextricably connected with the underlying policies of the First Amendment.[10]

In *Rounds* the University of Oregon had developed an elaborate system to ensure proper appropriation of the student fee pool, including required recognition of a student group by the elected student leaders at University of Oregon, a student group constitution that is not discriminatory, a primarily educational purpose, focus on issues of educational benefit to students, and compliance with public meetings and records laws.[11]

Cases like *Rounds* show how universities and all involved in the student fee and student organization and service process, can establish workable procedures to

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[10] *Rounds v. Oregon State Bd. Of Higher Educ.*, 166 F.3d 1932 (9th Cir. 1999).

[11] *Id.* at 1039.

carefully safeguard free speech in these limited public fora while minimizing any incidental effect on associational rights of individuals. The University of Wisconsin proposed similar changes to their mandatory student fee process, but had it rejected by the lower court in the present case. With many other jurisdictions determining that the limited educational forum provided by mandatory student fees is essential to the mission of institutions of higher education, and that content neutral selection of student groups and services for funding is constitutional, the student fees challenged here should be upheld.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

DATED this 14th day of June, 1999.

Respectfully Submitted,

NED R. JAECKLE*
University of Colorado
Student Legal Services
Campus Box 206
Boulder, Colorado 80309
(303) 492-6813

PAMARAH GERACE
North Carolina State University
University Student Legal Services
Post Office Box 7306
Raleigh, North Carolina 27695
(919) 515-7091

KATHLEEN A. CUSHING
Portland State University
Post Office Box 751
Portland, Oregon 97207
(503) 725-4570

National Legal Aid and Defender Association
Student Legal Services Section
219 – 19th Avenue South
160 West Bank Union
Minneapolis, Minnesota 55455
(612) 624-1001

**Counsel of Record*

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THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

MICHAEL S. SORGEN*
AMY R. LEVINE
Law Offices of Michael S. Sorgen
28 Second Street, 6th Floor
San Francisco, CA 94105
(415) 543-5805

PETER PURSLEY
2529 Capitol Avenue
Sacramento, CA 95816
(916) 972-1722

Attorneys for Amicus Curiae
UNIVERSITY OF CALIFORNIA
STUDENT ASSOCIATION

**Counsel of Record*

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In The

Supreme Court of the United States

October Term, 1999

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**Counsel of Record*

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INTEREST OF AMICUS

Amicus curiae UNIVERSITY OF CALIFORNIA STUDENT ASSOCIATION (USCA) [1] [2] is a non-profit, unincorporated association governed by representatives of the graduate and undergraduate student government associations at each of the nine University of California campuses and Hastings College of the Law. It is financed almost exclusively by activity fees collected from students enrolled at the University of California campuses.[3] UCSA's

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[1] This brief was authored by counsel for UCSA and not authored in whole or in part by counsel for the parties. No person or entity, other than UCSA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] All parties have consented to the filing of this brief. The letters from counsel indicating such consent are filed concurrently herewith. UCSA also joins in, and concurs with, the amicus curiae brief submitted by the United States Student Association.

[3] Each UCSA member organization is a university-recognized student association of all undergraduate, post-graduate, or professional school students enrolled at a campus of the University of California. Each was created, and each can be dissolved, by student majority vote. The general fee and any special fees of each association are established through fee referenda by student majority vote with approval by the Regents. Decisions to allocate those

mandate is to promote access to and further the cause of higher education and to promote the general welfare of the student body and the University. It does so by appointing students to numerous higher education decision-making bodies, by providing resources and support to student leaders on campus, and by advising and lobbying state government on issues of concern to students as students. In carrying out these tasks, UCSA provides educational opportunities to its student directors, interns, and volunteers, and to students on the University of California campuses, while ensuring that the student voice is heard.

UCSA submits this brief to urge the Court to reverse the United States Court of Appeals for the Seventh Circuit's decision in *Southworth v. Grebe*, 151 F.3d 717 (7th Cir., 1998) and find that respondents have no First Amendment right to opt out of paying a mandatory fee that funds private campus organizations engaged in political and ideological advocacy which are distributed in a viewpoint-neutral forum. However, if the Court finds that respondents do have such a right, UCSA urges the Court to reverse the Seventh Circuit's finding that petitioners, the University of Wisconsin (University), may not institute a refund procedure to accommodate students who object to the political and ideological uses of their funds. As explained below, a pro rata refund-escrow system is sufficient to meet all constitutional objections.

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fees are made by elected student representatives. UCSA is financed with a portion of those fees from each University of California campus student association that chooses to join UCSA.

UCSA has vital interests in the outcome of this case. UCSA engages in non-partisan political speech on behalf of University of California students with student activity fees. The fees are voluntarily contributed by UCSA's 19 member associations. Since the California Supreme Court imposed a refund requirement on those fees in 1993, they are now subject to a pro rata refund if requested by any University of California student who objects to their use, consistent with University policy. Thus, UCSA's ability to advocate on behalf of University of California students with essential fee support will be determined by this Court's decision.

SUMMARY OF ARGUMENT

Compelled speech cases do not apply to political or ideological activity funded by student activity fees, and therefore, no First Amendment right exists to withhold student activity fees used to support a student activity fund. Student activity fees create a forum from which student groups are allowed access to funds to support their speech and activities. The limited public forum created by such student activity funds support a diversity of viewpoints and serve as a vital part of the educational experience at public Universities.

In a university context, both political speech and activity are educational and should be funded in the same manner as other educational speech and activity. The dichotomy articulated by the Seventh Circuit in the case at bar between political speech and activity and educational speech and activity does not exist. Furthermore, to require public universities to categorize and scrutinize each group to see whether its speech and activities are more political than educational to determine which will receive funding, would result in unconstitutional content based discrimination.

However, assuming arguendo that compelled speech cases are applicable, an escrow-refund system addresses dissenting students' objections while ensuring that the student majority may continue to exercise its First Amendment right to use the funds for political and ideological speech. This Court's compelled speech cases make clear that it is constitutionally acceptable to collect fees from dissenters, place them into an interest bearing escrow account, and to subsequently refund the portion of the fees that were used for nonchargeable political or ideological activity.

Additionally, a majority of courts have upheld the use of escrow refund systems. The First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits have all upheld the procedure of placing fees into an interest bearing escrow account. This Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995), suggests that these principles apply in student fee cases, and the California Supreme Court in *Smith v. Regents of the University of California,* 4 Cal. 4th 843, 16 Cal. Rptr. 2d 181, 844 P.2d 500, *cert. denied*, 510 U.S. 863 (1993), has so held. Therefore, the Seventh Circuit erred in summarily rejecting the University of Wisconsin's proposal for a refund system to address objecting students concerns.

ARGUMENT

I. UCSA'S Experience with Student Fee Funding after *Smith v. Regents*: The Argument for Permitting Refunds of Student Activity Fees

A. California's Experience with Student Fee Rebate Systems

The availability of a refund mechanism as a constitutionally defensible alternative is of vital importance to

University of California students. In 1993, to the chagrin of student leaders throughout the University of California system, the California Supreme Court held that objecting students were entitled to procedural protections ensuring that their mandatory student fees not be used to finance political and ideological activities with which they disagreed. *Smith v. Regents of the University of California,* 4 Cal. 4th 843, 16 Cal. Rptr. 2d 181, 844 P.2d 500 (1993), *cert. denied*, 510 U.S. 863 (*Smith I*). The court decided that the only practical way to protect the dissenters' rights was to require the university to implement the procedural protections described in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) and *Keller v. State Bar of California*, 496 U.S. 1 (1990). The court interpreted those cases as requiring a system which would provide for a refund of the portion of a dissenting student's fees that supported a group whose primary purpose was political or ideological as opposed to educational. *Smith I* at 862-63, 866. Courts handling the litigation in the wake of *Smith I* have interpreted that decision as imposing a refund procedure for political and ideological activity by student activity groups and for student government lobbying. See, *Smith v. Regents of the University of California* 56 Cal. App. 4th 979, 981, fn. 1, 65 Cal. Rptr. 2d 813 (1997) (*Smith II*); *Associated Students of the University of California at Riverside v. Regents of the University of California*, No. C 98-0021 CRB, WL 13711 (N.D. Cal. Jan.8, 1999).

Unfortunately, although the California Supreme Court made it clear that the Regents were to adopt a refund mechanism, the Regents did not find implementation of the decision simple. An immediate difficulty the University of California confronted was determining which student activity was subject to a refund. This required the University to

distinguish political activity from educational activity, despite its long-standing belief that student political activity was educational.

Various options were proposed to protect the rights of dissenting students, including positive checkoffs, negative checkoffs, abolishing all mandatory student fees, and student referenda to establish completely voluntary funding of student political activity. These options were carefully considered, but ultimately opposed by student government as not being constitutionally required and for failing to ensure adequate funding for student activities that the majority of students had no objection to, and in fact, found vitally important to their educational experiences.[4]

Ultimately, the Regents did adopt a refund mechanism applicable to the lobbying and other political activities of some student groups, but not to student government which was required to fund its lobbying activities through voluntary fees. This lead to further litigation by a student government organization, claiming that the rights of the majority of students who had no objection to funding student government's political activities were being trammeled to protect dissenters' interests. *Associated Students v. Regents*, *supra*.

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4 Prior to the *Smith I* decision, UCSA opposed any limitation on the use of student fees for political and ideological activity. The *Smith I* decision forced UCSA to reluctantly recognize a refund system as the best alternative to a bad situation.

B. The Student Majority Has a Right to Engage in Political Speech with Student Activity Fees Without Being Silenced by Dissenters

Public universities have a legitimate interest in compelling students to contribute to a student activity fee. See, e.g., *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999); *Carroll v. Blinken*, 957 F.2d 991, 999-1003 (2nd Cir. 1992); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D.Neb. 1973), *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Kania v. Forham*, 702 F.2d 475 (4th Cir. 1983); *Hays County Guardian v. Supple*, 969 F.2d 111, 123-24 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993). When support is not compelled, apathy and the incentive to become a "free rider" create a funding problem for student activities.

Further, the majority of students who have no objection to the use of their fees for political activities have a right to engage in and financially support such speech without being silenced by the minority. Even in this Court's cases finding a right for dissenters to withhold financial support for some union political activity, this principle has been made clear. Thus, in striking down the lower court's injunction in *International Ass'n. of Machinists v. Street*, 367 U.S. 740 (1961), the Court reasoned that:

> ... the fact that these expenditures are made for political activities is an additional reason for reluctance to impose such an injunctive remedy. ... As to such expenditures **an injunction would work a restraint on the expression of**

> **political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters.** To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the [Railway Labor] Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other.

Id. at 773 (emphasis added). Likewise, in *Brotherhood of Ry. and Steamship Clerks v. Allen*, 373 U.S. 113 (1963), the Court invalidated an overbroad injunction, cautioning that:

> [N]o decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, **to expend nondissenters' such exactions in support of political activities**.

Id. at 122 (emphasis added). And similarly, in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), the Court specifically limited its holding so as not to infringe on the rights of the non-dissenting majority of union members:

> We do **not** hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as

> collective-bargaining representative. Rather, the Constitution requires **only** that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36 (emphasis added). Therefore, if student speech and debate are to flourish and the majority is not to be silenced by the dissenters, a refund-escrow mechanism must remain a viable funding alternative.

C. A Refund-Escrow System is the Only Practical Way to Implement *Hudson* at Public Universities

Moreover, a refund-escrow system is the only practical way to institute a student fee reduction at a university. In the case at bar, the University of Wisconsin collects from full-time students enrolled at the University's Madison campus a mandatory student activity fee each semester. The Associated Students of Madison (ASM), the student government, has complete authority over most of the allocable portion of the fee. *Southworth* at 719. The fee is used for the ASM budget, and to fund the General Student Service Fund (GSSF). Both the ASM and the GSSF monies are distributed to other private organizations. The GSSF is distributed to registered student organizations, University departments, and community based service organizations. *Id.*. The ASM funds registered student organizations, which are non-profit entities, controlled and directed by students, and composed mainly of students. Such registered student organizations receive funds in the form of operating grants,

travel funds, or funds to sponsor an activity or event. *Id.* at 719-20. The University reviews and has final authority over these funding decisions. *Id.* at 720.

The fee collection and distribution system at the University of Wisconsin is typical of public universities throughout the country. Student fees are typically administered and distributed by student government. Student government is, of course, run by students who are elected each year at the beginning of the school year. The student body, along with its elected representatives, change from year to year, as a new freshman class comes in, a senior class graduates, and students transfer in or out, take or return from leaves of absence, or fail or drop out. Generally, during summer break and other intercessions, student government ceases to function.

Student activity fees, as at the University of Wisconsin, are typically collected in a lump sum at the beginning of the quarter or semester from matriculating students, often just days before classes start. Unlike unions and state bar organizations, the fees are not distributed to a single organization with one budget. Instead, at large universities like the University of Wisconsin, they are distributed to well over a hundred separate groups, each with its own budget.

Thus, at the time fees are collected, student government has no way of knowing: 1) which student groups will exist in the upcoming year, 2) what the goals and planned activities of the student groups will be, 3) the amount of money each group will request and will receive from the activity fund, 4) whether any of the independently run student groups will engage in political or ideological activity during

the year which they could not or had not anticipated (e.g. an impromptu rally to oppose a sudden military action), 5) how much money last year's student groups actually spent on chargeable or non-chargeable activities, and 6) the identity and location of the students who will object to certain political and ideological uses of their funds, as this information changes from semester to semester.

Therefore, neither student government nor the university has sufficient information at the time fees are collected to calculate what fees, if any, will be used in the upcoming school year for political and ideological activity. If they were to guess, and to reduce certain students' fees in advance, this would have the "serious defect of depriving [students] to access to some funds that [they] are unquestionably entitled to retain." *Hudson*, 475 U.S. at 310. Further, without such information, they cannot provide potential objectors with "an adequate explanation of the basis for the fee" upon which to base an objection, as required by *Hudson*. Id. at 306, 310 (noting that the nonunion employee has the burden of raising an objection). See also, *Street*, 367 U.S. at 774 (only those objecting are entitled to relief; "dissent is not to be presumed").

A refund-escrow system avoids these problems. Such a system would allow all fees to be uniformly collected from all students. Before distribution to any group, an adequate proportion of the fees based on previous years' experiences with refund requests could be placed into escrow for a sufficient time to allow budgets and expense audits to be prepared, and funding decisions to be made. This information could be distributed to all registered students, who would then have an opportunity to object. After the period for objection ended, funds in escrow could be

distributed to student groups or rebated to the objectors. This system has the substantial advantage of ensuring adequate funding for student activities and speech, in that it does not allow students the choice to avoid paying all student activity fees for purely economic reasons, and provides relief to only those with genuine First Amendment concerns.

II. The *Southworth* Case

A. The District Court's Decision

The student fees allocated at the University of Wisconsin go to a variety of organizations, some of which engage in political and ideological speech. *Southworth*, at 720-21. Respondents, students at the University, object to the use of their fees to support political and ideological speech with which they disagree. They claim that the University's use of their fees in this manner violates their First Amendment rights.

The District Court found that respondents had a First Amendment interest in not having their mandatory student fees used to fund the political and ideological activities of campus groups whose views they found offensive. In determining their remedy, it rejected the University's proposed method for protecting objectors' First Amendment interests - a refund mechanism. It instead enjoined the University from funding private groups that engage in ideological or political advocacy, and ordered it to publish written notice of which organizations engaged in political or ideological speech, and the pro rata share of mandatory fees devoted to those organizations. It further ordered that the University establish an arbitration proceeding for disputes over the amount of fees paid and the nature of the

organizations involved. *Southworth* at 733.

B. The Seventh Circuit's Decision

On the University's appeal, the Seventh Circuit applied compelled speech cases from the union and integrated state bar context to the students' challenge. *Abood v. Detroit Bd. of Educ., supra,* 431 U.S. 209 (1977); *Keller, supra,* 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991). Using *Lehnert's* three part test, it found that even if funding private political and ideological organizations is germane to the University's mission, the forced funding of such organizations significantly adds to the burdening of the students' free speech rights. It therefore agreed with the District Court that the University could not use the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech with which they disagreed. *Southworth* at 732-33.

The Seventh Circuit also agreed that, "[i]n issuing the injunction, the district court properly rejected the Regents' proposed procedure for compliance - a refund mechanism." *Southworth* at 733. In so finding, it relied on this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1985) for the proposition that (in the union context) a pure rebate approach inadequately protects the constitutional rights of objecting employees. It quoted *Ellis*, 466 U.S. at 443-45:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization.

> The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.

The court rejected the University's claim that it could not establish a pro rata reduction in advance since it had no way of knowing at the time fees were collected how they would be spent. Again, it relied on *Ellis*: "The only justification for this union borrowing would be administrative convenience. ... Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Southworth* at 733, quoting *Ellis* at 443-45.

The Seventh Circuit then went on to hold the District Court's injunction overbroad for preventing the University from funding political and ideological activity with non-objecting students' fees. *Southworth* at 733-34. In light of principles of federalism and comity, it enjoined the University from using the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech, but left it up to the University to devise a fee system consistent with its decision and Supreme Court precedent. *Id.* at 734-35. In guiding the University in how to comply with its decision, the court cautioned:

> ... we reiterate that under our holding above, the University cannot even temporarily collect

> from objecting students the portion of the fees which would fund organizations which engage in political and ideological activities, speech, or advocacy, whether or not the organization also provides some service in doing so.

Id. at 735.

III. The Court Erred in Applying this Court's Compelled Speech Cases, Since Student Activity Fees Create a Public Forum Accessible Equally to All Students

It is undisputed that some of the student fees distributed by the University are used by student groups for political and ideological speech. Undoubtedly, those same groups and other groups receiving fees engage in speech which is purely academic, social, or recreational. As petitioners have argued in their Petition for Writ of Certiorari, and as this Court found in its *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) decision, the student activity fee creates a limited public forum through which the university spends funds to encourage a diversity of private speech. *Rosenberger*, 515 U.S. at 830. The expression of a diversity of viewpoints on campus is a vital part of the educational experience of this and every public university. See, e.g., *Rosenberger*, 515 U.S. at 840 (the "student activity fee [is] designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission"); *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the "market of ideas ...").

Because student political speech and activity in a university context is educational, the dichotomy articulated by the Seventh Circuit between educational activity and political activity is a false one. Universities cannot make this distinction because, as a matter of fact and of law, it does not exist. *Healy*, 408 U.S. at 180-81. Further, to require universities to evaluate the activities of each student group that receives funding misconceives the universities' purpose for creating a student activity fee. Universities do not fund student groups to support any particular student group or its viewpoint. They fund a forum which allows student groups to access funds because student speech creates a vibrant, stimulating intellectual environment for students that enhances their educational experience.

Moreover, by requiring public universities to scrutinize and categorize each student group based on the university's judgment that its activity is somewhat more political than educational (or vice versa), the court is requiring universities to engage in unconstitutional content based discrimination. This contravenes a long line of Supreme Court authority. See, *Rosenberger*, 515 U.S. at 832-36 (holding that the university could not pay for printing costs of all eligible student organizations from student activity fee except a Christian student newspaper on the basis of its religious viewpoint, and stating that the first danger to liberty lies in granting the State the power to examine publications and classify them based on viewpoint, the second is the chilling of individual thought and expression); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (holding that policy of opening university facilities to some student groups required university to open them to all groups without regard to religious content of their activities); *Healy*, 408 U.S. at 181, 184 (holding that college must meet "heavy burden"

before denying official recognition to SDS chapter on basis of group's political activities). For these reasons, *amicus curiae* UCSA urges the Court to find that respondents' First Amendment interests are not even implicated by the student fee system.

IV. The Seventh Circuit Was Wrong in Summarily Rejecting The University's Proposal Because a Refund-Escrow Procedure Adequately Addresses the Dissenters' Objections Without Silencing the Majority

Assuming, *arguendo*, that *Abood* and *Keller* do apply to student activity fees collected to support a limited public forum where all student organizations are eligible to be funded without regard to the political, ideological, or religious viewpoint of their speech, neither the District Court nor the Seventh Circuit should have summarily rejected the University's proposal for a refund mechanism. Cases in both the compelled speech and the student speech areas make that holding error. Moreover, as demonstrated above, a refund-escrow system is the only practical way to address dissenters' objections without trammeling the rights of the majority to be heard.

A. The Supreme Court's Compelled Speech Cases Allow for an Escrowing of Fees Subject to a Refund

The Supreme Court's compelled speech cases make clear that it is constitutionally acceptable to collect fees from dissenters, place them into an interest bearing escrow account, and to subsequently refund the portion of the fees that were used for nonchargeable political or ideological

activity.

In *Ellis*, agency fee paying employees challenged the union's rebate system which allowed the union to collect the full amount of dues from them, use part of their dues for political activities they found objectionable, and rebate the equivalent amount spent on objectionable activities a year later. *Ellis*, 466 U.S. at 440-41. The Court held that the harm from this pure rebate scheme would be reduced if the union had paid interest on the amount refunded, but it did not do so. *Id.* at 444. It stated that:

> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, **such as advance reduction of dues and/or interest-bearing escrow accounts,** that place only the slightest additional burden, if any, on the union.

Id. (emphasis added).

In so holding, the Court clearly endorsed the option of using an interest-bearing escrow account in conjunction with a rebate. In reaching its decision, it reviewed with apparent approval its prior decisions which suggested the appropriateness of a refund procedure. Specifically, it noted *Street*'s suggested remedy of "'restitution to each individual employee of that portion of his money which the union

expended, despite his notification, for the political causes to which he had advised the union he was opposed,'" *Ellis* at 443 (quoting *Street*, 367 U.S. at 775), and *Allen*'s proposal of a refund, to any employee who indicated his opposition to the use of his funds, of a portion of the exacted funds in the same proportion that political expenditures bore to the total union expenditures, and a reduction of future exactions in the same proportion, *Ellis*, at 443 (citing *Allen*, 373 U.S. at 122).

In *Hudson*, non-union members were charged 5% less at the outset than union members and provided the subsequent opportunity to object to uses paid for with the dues that were actually collected from them. Non-union members who lodged objections with the union sued to challenge the union's procedure as to the funds actually extracted from them. The advance reduction used by the union was not challenged, and was never passed on by the Court.

The Court found "three fundamental flaws" with the union's scheme. First, "a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Id.* at 303. Second, noting that the nonunion employee has the burden of raising an objection, the Court found that "the 'advance reduction of dues' was inadequate because it provided nonmembers with inadequate information [upon which to base any possible objection] about the basis for the proportionate share." *Id.* at 306.

Third, the procedure was "defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307.

During the course of the litigation, the union had voluntarily put 100% of the plaintiffs' dues into escrow and agreed to do so for other employees while disputes about their dues were pending. *Id.* at 309. The Court noted that although that remedy cured the first defect with the union's scheme, it was not constitutionally required. "Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain." *Id.* at 310. But, the Court did ultimately hold that:

> ... the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Id..

Thus, *Hudson* ruled that the escrowing of amounts that could reasonably be challenged by objectors cured the first defect - i.e., the risk that funds may be used temporarily for an improper purpose. Significantly, it did not rule that

rebating in and of itself was a "fundamental flaw" in the union's scheme. Thus, it appears that *Ellis'* endorsement of "interest-bearing escrow accounts" as an adequate remedy remains sound. See also, *Keller v. State Bar of Cal.*, 496 U.S. 1, 16-17 (1990) (applying *Hudson's* ruling to integrated state bars).

B. The Majority of the Courts of Appeals Have Upheld the Use of Escrow-Refund Systems

In *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993), the Ninth Circuit held that an escrow-refund mechanism used to collect fees from public school teachers passed constitutional muster. In *Grunwald*, the court evaluated the following system: The teachers' union deducted the same amount of money each month from the paychecks of union and non-union members. However, the fees charged to non-union members were put into an interest-bearing escrow account. Following the first monthly deduction in September, the union sent a notice to all non-union members telling them how to obtain a rebate of non-chargeable dues, along with an explanation of how the union calculated that amount. To obtain a refund, non-members had to submit a letter objecting to the union's use of the funds by a specified date. If the non-member agreed with the union's calculation, the refund was immediately processed. If not, the non-member could request that the

calculation be determined by a prompt arbitration, at the union's expense.

The court approved of this procedure, noting that *Ellis* allows unions to adopt procedures "such as advance reduction of dues and/or interest-bearing escrow accounts" in fulfilling their obligation to not use objectors money, even temporarily, for ideological purposes. *Grunwald*, 994 F.2d at 1374. The court found this procedure justified for public school teachers because every year different teachers are employed, and every year, different teachers choose to be or not to be union members. This fluctuation made an advance reduction system exceedingly difficult to implement. *Id.* at 1376-77. The same situation is present among university students, where there is even more fluctuation from year to year.

The Eleventh Circuit came to a similar conclusion in *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990), *cert. dismissed*, 502 U.S. 104 (1991). After this Court's decision in *Hudson*, the Florida Bar adopted a procedure to address the concerns of objecting Bar members. Bar dues were uniformly collected from all Bar members. If the Bar adopted a legislative position on an issue, it published its position in its journal and circulated it to all Bar members. Within 45 days of receipt of the notice, a member could object to a legislative position. If a member objected, the Bar then determined the pro rata amount used to fund that activity and put it into an escrow account. The Bar had 45

days to either refund the pro rata share or refer the matter to arbitration. *Gibson*, 906 F.2d at 628-29.

The plaintiff contended that providing a refund instead of an advance reduction of dues for the portion the Bar knew would be used for political activity was unconstitutional. *Id.* at 631. The Bar argued that interest bearing escrow accounts were permissible, and that an advance deduction was not feasible because it could not predict, at the time dues are assessed, what political activity it will undertake in the upcoming year. *Id.* Under *Keller*, objectors were not entitled to deduct dues for all political activity, just that activity not germane to, and necessarily or reasonably incurred in furtherance of, the government's purposes for compelling the association - *i.e.*, regulating the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 13-14.

The Eleventh Circuit held that:

> In *Ellis* [citation omitted], the Supreme Court invalidated a "pure rebate approach" but noted the existence of "readily available alternatives, such as advance reduction of dues *and/or interest-bearing escrow accounts*." (Emphasis added). The Court restated this proposition in *Chicago Teachers*, 475 U.S. at 303-04, 106 S.Ct. At 1074 (quoting *Ellis*), and stated that "an escrow for the amounts reasonably in

> dispute," along with an adequate explanation of the fee and an opportunity to challenge the amount, would satisfy the constitutional requirements for an objection procedure. [Citation omitted]. These statements provide indisputable authority that an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient."

Gibson at 631.

A majority of the circuits have similarly upheld the use of escrow-refund mechanisms. See, *Andrews v. Education Ass'n. of Cheshire*, 829 F.2d 335, 339 (2nd Cir. 1987) (teachers' agency fees collected through payroll deductions until objection made; after objection, 100% of fees put into interest-bearing escrow account until arbitrator resolves dispute and union calculates rebate); *Crawford v. Air Line Pilots Ass'n. Intern.*, 870 F.2d 155, 160-61 (4th Cir. 1989), *aff'd en banc*, 992 F.2d 1295, 1301-02 (4th Cir. 1993) (union deposits 150% of estimated amount of rebate obligation based on previous years' experience, budget projections and any other available information into an interest bearing escrow account; independently audited report of germane and non-germane expenses from previous year distributed by May 31st, along with lump sum rebate with interest); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 626, 634-37 (1st Cir. 1990) (Bar's rebate and escrow system can pass constitutional muster; at time dues

paid, attorneys can file general objection to use of dues for ideological activities unrelated to core purposes; objection triggers escrowing of dues until dispute resolved; escrow amount must be determined and disclosed to members before dues assessed, and must be based on verified accounting of projected expenditures derived from previous years' experiences, plus a buffer). See also, *Hohe v. Casey*, 868 F.2d 69, 71-72 (3rd Cir. 1989), *cert. denied*, 493 U.S. 848 (1989) (affirming denial of motion for preliminary injunction on collecting agency fees where union escrowed 100% of agency fees until disposition by impartial arbitrator).

Prior to the *Southworth* decision, the Sixth Circuit stood alone in requiring an advance reduction of fees. Notably, neither of the Sixth Circuit cases involve either teachers or students. *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987).

Thus, the Courts of Appeal have generally agreed with the Second Circuit's assessment in *Andrews*, *supra*,

> ... we do not believe that *Hudson* stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable. When the union's plan satisfies the standards established by *Hudson*, the plan should be upheld even if its opponents can put forth some plausible

> alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support.

Andrews, 829 F.2d at 340.

C. The Same Principles Allow for a Refund In Student Fee Cases

In their Brief in Opposition to the Petition for Writ of Certiorari, the respondents argue that *Rosenberger* directed the courts to *Abood* and *Keller* to decide the rights of dissenting students to withhold financial support from the student fee public forum. Assuming that *Abood* and *Keller* apply, *Rosenberger* also suggests the appropriate remedy. The *Rosenberger* Court stated:

> The [student activity] fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. [Citing *Keller* and *Abood*].

Rosenberger, 515 U.S. at 840. See also, *Rosenberger*, 515 U.S. at 851 (O'Connor concurring). The use of the words

"pro rata return" strongly suggest that the Court has not overruled *Ellis'* holding that a refund from fees held in an interest-bearing escrow account is a constitutionally acceptable way to protect the rights of dissenters.

Because the majority of courts confronting First Amendment challenges to uses of the student activity fund have found no Constitutional problem with compelling contributions to the fund, only three courts have confronted the situation the *Southworth* court did where students were found entitled to a remedy to prevent their funds from supporting campus groups they found objectionable. All of those cases were decided before *Rosenberger*, and are of dubious precedential value. *Smith I*, *supra*, *Carroll*, *supra*, and *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985). And, only one of those cases, *Smith I*, presented a truly analogous situation where the funding of a variety of groups from a viewpoint neutral activity fee forum was challenged.[5]

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5 Neither *Galda* nor *Carroll* are truly applicable here. In *Galda*, the fee challenged, although refundable, was not for a general student activity fund, but was specifically earmarked for an independent outside organization, the New Jersey Public Interest Research Group, a self proclaimed political advocacy group. *Galda*, 772 F.2d at 1064, 1067-68 (enjoining earmarked assessment of refundable fee payable to NJPIRG). The *Galda* court took care to distinguish this situation from one where a student group is

As discussed above, in *Smith I* the California Supreme Court ordered the University of California to adopt a procedure to refund student activity fees to students who objected to the political and ideological activities of student groups and to lobbying by student government. *Smith I*, 4 Cal. 4th at 863, 866. Thus, there is no support in the student fee cases for the Seventh Circuit's *Southworth* holding that a refund mechanism does not meet constitutional standards.

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funded out of a mandatory student activity fee creating a forum for a diverse range of opinion. *Id.* at 1064, 1067. Likewise, in *Carroll*, dissenting students challenged the automatic distribution of a portion of their fee to the New York Public Interest Research Group (NYPIRG), pursuant to a contract between NYPIRG and the student government. *Carroll*, 957 F.2d at 993. Because of the substantial interest the university had in promoting extracurricular life, fostering concrete skills and a sense of civil duty, and stimulating energetic campus debate, the Second Circuit held that dissenters could be compelled to pay for some of NYPIRG's activities, but not for those conducted off the State University of New York, Albany campus. *Id.* at 1001. Therefore, it held that the University could constitutionally allocate students' activity fees to NYPIRG as long as NYPIRG spent the same amount of money on the Albany campus as was contributed by Albany students. *Id.* at 1002.

CONCLUSION

For the foregoing reasons, UCSA urges the Court to reverse the Seventh Circuit and find no First Amendment right to withhold fees used to support a student activity fund which creates a public forum for the expression of diverse student views. If the Court does find such a right, UCSA urges the Court to reverse the Seventh Circuit's summary conclusion that a refund system would not meet minimal constitutional requirements, and to remand for further proceedings.

Dated: June 14, 1999

Respectfully submitted,

LAW OFFICES OF MICHAEL S. SORGEN

MICHAEL S. SORGEN
28 Second Street, 6th Floor
San Francisco, CA 94105
Counsel for *Amicus Curiae*
UNIVERSITY OF CALIFORNIA
STUDENT ASSOCIATION

F:\DOCS\Southworth\revised.amicus.wpd

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In The

Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS FAMILY RESEARCH INSTITUTE IN SUPPORT OF RESPONDENTS

ROY H. NELSON
Attorney For Amicus
Petrie & Stocking, S.C.
111 E. Wisconsin Ave.
Suite 1500
Milwaukee, WI 53202
(414) 276-2850

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INTEREST OF AMICUS CURIAE[1]

The Family Research Institute is a non-partisan, not-for-profit, pro-family, state legislative research institute. The Institute is dedicated to researching issues of interest to and which have an impact on Wisconsin families, and then disseminating that information to institutions and individuals. The Institute's goal is to strengthen and educate Wisconsin families.

The freedoms of speech, religion and the press are of inherent value to Wisconsin's families and, hence, to the Family Research Institute. Specifically, when students attending the University of Wisconsin are compelled to support speech or activity contrary to their and their families' principles, the Family Research Institute believes it necessary to respectfully offer its views regarding the legal and historical principles underlying the drafting and adoption of the First Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

There is a substantial history behind the development of freedom of opinion, both in the common law and in the charters, declarations and constitutions that preceded the ratification of the First Amendment. Proper application of that

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was originally authored by Attorney Daniel Kelly and submitted on behalf of *amicus* in the United States Court of Appeals for the Seventh Circuit. Attorney Kelly has since been requested to participate as co-counsel on behalf of respondents. *Amicus* has requested Attorney Roy H. Nelson to act as counsel in submitting this brief on its behalf. Costs of submission of this brief in this Court have been underwritten by *amicus*.

Amendment's guarantees requires reference to the circumstances and struggles both preceding and coincident with its ratification. A brief survey of that history reveals that the Framers' overarching purpose in securing the freedom of speech, religion and of the press was to accomplish the larger goal of building a jurisdictional barrier between the government and matters of the mind.

Requiring students at the University of Wisconsin to subsidize speech, advocacy, or pursuit of ideological or partisan activities with which they may disagree impermissibly breaches that Constitutionally erected barrier. The District Court appropriately concluded that the University's system of disbursing portions of the mandatory segregated fees to private ideological and political groups was inconsistent with rights secured by the First Amendment.

This Court should affirm the decision of the District Court invalidating this financing system, thereby returning control over the content and extent of ideas in the marketplace to whom it belongs, *viz*., the advocates of those ideas.

ARGUMENT

I. HISTORICAL ANALYSIS OF THE DEVELOPMENT OF THE FIRST AMENDMENT'S GUARANTEES

A major part of the development of Occidental civilization has been the continuing struggle to contain governmental control within a closely defined sphere of authority. One of the most important aspects of that saga has been the eradication of a pernicious influence on the domain of ideas, that is, governmental interposition. The goal of such influence over

matters of the mind has traditionally been accomplished by means of controlling the methods of dissemination, either by prohibition or compulsion. The purpose and effect have always been the same, to wit, a state-imposed orthodoxy over opinion, and sometimes even over matters of fact.

A. Hegemony Over Issues of Fact

It is broadly known that governments throughout history and around the world have long been prone to suppressing opinions deemed inappropriate by those in authority, and enforcing conformity to those they preferred. Just over a century ago, Joseph Story observed that:

> It is notorious that even to this day in some foreign countries it is a crime to speak on any subject, religious, philosophical, or political, what is contrary to the received opinions of the government or the institutions of the country, however laudable may be the design, and however virtuous may be the motive.

1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 610 (Thomas M. Cooley, ed. 1873). But the extent of governmental intervention in the realm of ideas overflows the banks of opinion and spills into the domain of facts the farther one pushes back history's horizon. Over 200 years ago Thomas Jefferson remarked on the banal tendency of some states to enforce their own views of reality:

> Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as a medicine

and the potatoe [sic] as an article of food. Government is just as infallible too when it fixes systems in physics. Galileo was sent to the inquisition for affirming that the earth was a sphere: the government had declared it to be as flat as a trencher, and Galileo was obliged to abjure his error. This error however at length prevailed, the earth became a globe, and Descartes declared it wise whirled round its axis by a vortex. The government in which he lived was wise enough to see that his was no question of civil jurisdiction, or we should all have been involved by authorities in vortices. In fact, the vortices have been exploded, and the Newtonian principle of gravitation is now more firmly established, on the basis of reason, than it would be were the government to step in, and to make it an article of necessary faith.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 232-33 (2nd Amer. ed. 1794). Fortunately, the error of erecting the edifice of science on the unsure foundation of government-dictated reality became patent and the flawed structure buckled under its own weight. The importance of that failed experiment to the issue at hand is that Thomas Jefferson employed the structural defects made apparent in the realm of governmental meddling in matters of fact to justify liberty in the realm of non-scientific matters, that is, opinions or conscience. However, the error has proven disturbingly resilient in the face of repeated attempts to permanently expunge it. To this day, as this case illustrates, there are still a few pockets of resistance that have yet to yield to history's tide toward greater liberty.

B. Hegemony Over Issues of Opinion.

Liberalization in matters of opinion, denominated as speech, religion and the press in our Constitution's First Amendment,[2] is not something that has progressed in this country on the basis of utility or generosity on the part of those in authority, but through an increasing awareness that the state lacks the jurisdiction to regulate the sphere in which those specific rights reside. The most illustrative example of the evolution of this understanding is the state's forced retreat from the provinces of religion, chief among the rights of conscience.

1. Matters of Religion as Chief Example.

In an abortive attempt to liberalize the Crown's interaction with matters ecclesiastical, King Charles II declared in 1660:

> And because the passion and uncharitableness of the time have produced several opinions in religion, by which men are engaged in parties and animosities against each other (which, when they shall hereafter unite in freedom of conversation, will be composed or better understood), we do declare a liberty to tender consciences, and that no man shall be disquieted or called in question for differences of opinion in matter of religion, which do not disturb the peace of the kingdom; and that we shall be ready to consent to such an Act of

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[2] The First Amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."

> Parliament, as, upon mature deliberation, shall be offered to us, for the full granting of that indulgence.

DECLARATION OF BREDA (April 4, 1660) (reprinted in SOURCES OF OUR LIBERTIES 162 (Richard Perry, ed., rev. ed. 1991) (quoting THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625-1660 466 (Samuel R. Gardiner, ed. Oxford 1906))). Three years later, he granted the Charter of Rhode Island and Providence Plantations, in which he provided:

> That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye hav and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peaceablie and quietlie, and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbance of others. . . .

CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1633) (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 170). Significantly, the basis for allowing this freedom was, in the case of the Declaration of Breda, an "indulgence" and in the Charter an outgrowth of the king's "royall will and pleasure."

As such, the English subjects would have had, if the Declaration had found expression in an Act of Parliament, and the colonists in fact did hold, nothing more than a privilege, which could have been revoked upon a change in the King's favor.

When the colonists began creating their own governing structures, there was frequently introduced a profoundly different rationale upon which to base the freedom of the mind. Pursuant to the Quintipartite Deed of 1676, in which the Quakers, under the influence of William Penn, assumed ownership of West New Jersey, the proprietors and freeholders there of instituted the Concessions and agreements of west New Jersey as the foundation of their government in 1677. SOURCES OF OUR LIBERTIES, *supra* at 181. They agreed amongst themselves

> THAT no men, nor number of men upon earth, hath power or authority to rule over men's consciences in religious matter, therefore it is consented, agreed and ordained, that no person or persons whatsoever within the said Province, at any time or times hereafter, shall be any ways upon any pretence whatsoever, called in question, or in the least punished or hurt, either in person, estate, or privilege, for the sake of his opinion, judgment, faith or worship towards God in matters of religion. But that all and every such person, and persons, may from time to time, and at all times, freely and fully have, and enjoy his and their judgements, and the exercises of their consciences in matters of religious worship throughout all the said Province.

CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY, chap. XVI (March 13, 1677) (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 185)

These proprietors and freeholders recognized that one person, or a combination of them, lacks the authority to require another to conform to some religious orthodoxy. Thus, instead of purporting to grant a mere boon, they recognized a jurisdictional barrier between individuals' opinions and government's legitimate sphere of control. The Bill of Rights contained in the 1776 Constitution of Virginia expressed the same idea thusly:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . .

VIR. CONST. of 1776, sec. 16 (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 312). The Delaware Declaration of Rights also mandated that "no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner control the right of conscience in the free exercise of religious worship." DELAWARE DECLARATION OF RIGHTS, sec 2 (September 11, 1776) (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 338).

Mr. Story, in surveying the import of the First Amendment, had recourse to John Locke, who affirmed that "'[n]o man or society of man . . . have any authority to impose

their opinions or interpretations on any other, the meanest Christian; since, in matters of religion, every man must know, and believe, and give an account for himself.'" I STORY, *supra* at 606 (citation omitted). This principle, that government acts outside its jurisdictional limits when it impacts matters of faith, applies much more broadly than with respect to religion only. In fact, Thomas Jefferson based his argument for the freedom of religion on the general proposition that the state lacks authority to compel a particular belief in any subject.

2. Application of Religion's Example to All Matters of Opinion.

Mr. Jefferson, drawing upon his historical understanding of the futility of governmental attempts to control the realm of facts by edict, "swor[e] upon the altar of God eternal hostility to every form of tyranny over the mind of man." II HENRY SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 363-65 (Faculty of Law, Northwestern University, ed. 1921). His down payment on that oath, the Virginia Act for Religious Liberty, begins:

> Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness . . . ; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others . . . ; that

to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ; that our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy . . . ; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them . . .

VA Code Ann. sec. 57-1 (1950) (originally enacted January 16, 1786). Upon the Act's passage, James Madison, its chief proponent, wrote Jefferson he was certain the Act's provisions "have in this country extinguished forever the ambitious hope of making laws for the human mind." IRVING BRANT, JAMES MADISON: THE NATIONALIST 354 (1948). The goal was still a work in progress by 1794 when Jefferson opined:

> The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rules can have no authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are

> answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others.

JEFFERSON, *supra* at 231. In these statements both Madison and Jefferson elucidated the overarching principle: that government shall have no interference with matters of the mind.

Alexis de Tocqueville, in most points a very perceptive commentator on American law and society in the 19th century, correctly identified a crucial principle regarding freedom of the mind:

> It is in the examination of the exercise of thought in the United States that we clearly perceive how far the power of the majority surpasses all the powers with which we are acquainted in Europe. Thought is an invisible and subtle power that mocks all the efforts of tyranny. At the present time the most absolute monarchs in Europe cannot prevent certain opinions hostile to their authority from circulating in secret through their dominions and even in their courts. It is not so in America; as long as the majority is still undecided, discussion is carried on; but as soon as its decision is irrevocably pronounced, everyone is silent . . . . The reason for this is perfectly clear: no monarch is so absolute as to combine all the powers of society in his own hands and to conquer all opposition, as a majority is able to do, which has the right both of making and of executing the laws.

> The authority of a king is physical and controls the actions of men without subduing their will. But the majority possesses a power that is physical and moral at the same time, which acts upon the will as much as upon the actions and represses not only all contest, but all controversy.

I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 263 (Phillips Bradley, ed. 1991). M. de Tocqueville correctly identifies the awesome power the majority holds and its capacity to eviscerate all competing opinions when combined with the power of government. Indeed, as Mr. Carroll remarked in discussion of the Bill of Rights in the House of Representatives, "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ." II BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1088 (1971) (quoting debates of the House of Representatives on August 14, 1789). While thought may mock all attempts at tyranny, the government has at its disposal means by which it may deliver more than a gentle touch to the liberties of conscience. However, when decrying the purported unlimited power of the majority in his conclusion that "I know of no country in which there is so little independence of mind and real freedom of discussion as in America," DE TOQUEVILLE, *supra* at 263, what M. de Toqueville failed to account for was the distinctively anti-majoritarian provisions developed as an antidote to the potentially smothering effect created by majority control of the organs of government.

C. Freedom of the Press and Speech as Derivative Liberties.

1. Regarding the Press.

It is not sufficient that a person be free to believe as he should choose in private only – the ability to communicate those ideas unimpeded by fear of civil incapacitations must be preserved inviolate if there is to be any chance of achieving

> the advancement of truth, science, morality, and arts in general, and in the diffusion of liberal sentiments on the administration of government, the ready communication of thought between subjects and the consequential promotion of union among them whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.

Address of First Continental Congress to the Inhabitants of Quebec (October 26, 1775) (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 285). Such were the First Continental Congress' concerns when it proclaimed that the press should be free. This can fairly be characterized as a backlash to the Crown's specific compassing of the destruction of that freedom. England long recognized the truth Mr. Story would later enunciate, that the press "works with a silence, a cheapness, a suddenness, and a force, which may break up in an instant all the foundations of society, and move public opinion, like a mountain torrent, to a general desolation of every thing within its reach." I STORY, *supra* at 618. Historically, out of fear of that kind of unregulated power, in many countries "the press has been shackled, and compelled to speak only in the

timid language which the cringing courtier or the capricious inquisitor, should license for publication." I STORY, *supra* at 610-11.

The guarantee of the freedom of the press ensconced in the First Amendment was not secured for its own sake, but out of a recognition that

> [t]o subject the press to the restrictive power of a licenser, as was formerly done before and since the revolution (of 1688), is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.

I STORY, *supra* at 612. This freedom is derivative of the overarching freedom of opinion, and finds significance in its pursuance. Because freedom of opinion in England has traditionally been classified as a privilege, rather than a right, the freedom of the press is there much less secure. Although regulation there has, for all intents and purposes, lapsed,[3] it is because of the expiration of licensing statutes, and not because of a recognition that regulation would impermissibly intrude on ground over which the government may hold no sway.

In the United States, however, the liberty of the press was conceived as a necessary derivative of the freedom of opinion and conscience it was meant to serve and protect. In Blackstone's words, "[t]he liberty of the press is indeed essential to the nature of a free state . . . . [for] [e]very freeman has an undoubted right to lay what sentiments he pleases before

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[3] *See* STORY *supra* at 611.

the public: to forbid this is to destroy the freedom of the press . . . ." IV WILLIAM BLACKSTONE, COMMENTARIES *151-52. Years before ratification of the First Amendment, most of the new states guaranteed this freedom in their constitutions. Virginia, for example, declared "[t]hat the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments." VIR. CONST. OF 1776, sec. 12. The First Amendment's provision regarding the press simply reflected what was already an extant fact in the state constitutions, and guaranteed the federal government would respect the jurisdictional boundary therein established.

2. Regarding Speech.

So too is the freedom of speech a means of implementing and preserving the freedom of opinion. This specific guarantee grew out of the crucible of political disputes that formed the heritage of the colonists and Framers of the Constitution. Although freedom of debate within Parliament was established as long ago as 1512 in Strode's Act, which "condemned all forms of punishment imposed upon members of Parliament for debating bills or other matters in Parliament," see SOURCES OF OUR LIBERTIES, *supra* at 234, the right was not secure. A century later, in an address to King James I, Parliament reiterated that "'[w]e hold it an ancient, general, and undoubted right of parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of parliament is withal dissolved,'" *Id.* The King responded that Parliament enjoyed the liberty of speech as a "toleration" rather than an "inheritance." *Id.* Parliament protested, remonstrating

> That the liberties, privileges, and jurisdictions

> of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the king, state, and the defense of the realm, and of the church of England, and the maintenance and making of laws, and redress of mischiefs and grievances which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses every member of the House of Parliament hath and of right ought to have freedom of speech, the propound, treat, reason, and bring to conclusion the same: that the Commons in Parliament have like liberty and freedom to treat of these matters in such order as in their judgments shall seem fittest: and that every member of the said House hath like freedom from all impeachment, imprisonment, and molestation (other than by censure of the House itself) for or concerning any speaking, reasoning, or declaring of any matter or matters touching the Parliament or Parliament business . . . .

Id. Parliament's effort, correct in its philosophical basis, was doomed from the start, for the freedom of opinion yet was understood to be a privilege in England, not a jurisdictional barrier to governmental interference. Thus, the freedom of speech, valuable because of its derivation from the right to be free in one's opinions, was held in little esteem when believed to be in service of a privilege only. King James summarily

dissolved the Parliament. Re-establishment of this ancient prerogative did not find its way back into the organic laws of England until the Bill of Rights of 1689, which the Ministers asserted "[t]hat the freedom of speech, and debates or proceedings in parliament, ought not be impeached or questioned in any court or place out of parliament." BILL OF RIGHTS OF 1689, sec. 9 (December 16, 1689) (Eng.).

This guarantee may be found in early state constitutions, such as that of Massachusetts, which provides that "[t]he freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." MASS. CONST. OF 1780, art. XXI (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 377). This provision is reflected in the Federal Constitution at Article I, section 6: "for any speech or debate in either House, they [Senators and Representatives] shall not be questioned in any other place." These guarantees did not, in and of themselves, reach the citizens of the United States.

In England the Crown or, depending on the stage of development of the constitutional monarchy, Parliament, constituted the sovereign temporal authority; rights, therefore, were established by carving from the government's sphere of power niches of liberty. However, in the United States the Framers comprehended the Federal Constitution as a grant of limited authority from the true found of sovereignty, *viz.*, the people. Thus, the government would have no authority but that granted by those who were to be governed. Against this, it was thought, no specific enumeration of rights was necessary. This

tightly circumscribed realm of authority would, of itself, leave the people free from oppression based on advocacy of their opinions. However, to alleviate the concerns of the Anti-Federalists and secure ratification of the proposed constitution, it was agreed that a Bill of Rights would be proposed. James Madison, the First Amendment's author, understood the result of his handiwork to embody the principle that "the people have a right to express and communicate their sentiments and wishes," II SCHWARTZ, *supra* at 1096, and further that its effect had been that:

> [t]he right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may express their will.

Id. The First Amendment assured that the people would enjoy the same type of right as members of the legislature, notwithstanding the fact that it took several years for that liberty to be fully enjoyed. Mr. Story summed up the purpose of the First Amendment thusly: "[i]t is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint . . . ." I STORY, *supra* at 610.

D. Application of the Historical Principles to the Instant Case.

"In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasoning must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind." THE FEDERALIST NO. 31, at 193 (Easton Press 1979). The brief rehearsal of the historical basis of the freedom of opinion illustrates that this principle is a truth so primary that it can bear little questioning. So too are the related truths that freedom of speech and the press must be maintained inviolable in service of the freedom of the mind. From this, then, must be determined the appropriateness of diverting portions of the segregated funds to certain student groups or activities.

The University of Wisconsin's financing scheme transfers one person's property to another for the purpose of advancing the latter's opinions, ideas or message.[4] It may be safely presumed that the justification for resisting a change in this policy is that the recipients of this largesse would not receive an equal amount from some other source if the scheme was abandoned. Thus, inasmuch as financial resources are essential to the promotion of one's cause, the University has placed its thumb on the balance of ideas extant in the marketplace of ideas. Absent the compelled contribution, that

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[4] It is irrelevant that the funds go first through the intermediary of a student governmental body. The instant question is not how the funds are divided, but whether compelled contributions to a fund that inevitably supports ideas antithetical to the contributor offend the First Amendment.

marketplace would have a different mix of advocates, and the vigor with which those advocates would be able to promote their ideas would change depending on the funds available to them. This is not to be deplored, but celebrated as the natural consequence of a properly functioning free society. Not all ideas have equal merit, and some will wither for their inability to gain adherents or underwriters, but this in no way recommends that in such instances the state should step in to subsidize the faltering opinion. Such a course would be as mistaken as if the government had decided to resist the ascendency of Einsteinian physics over Newtonian. As Jefferson cogently observed, "[i]t is error alone which needs the support of government. Truth can stand by itself." JEFFERSON, *supra* at *129. He then observed that

> there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights[;] the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most excessive sense.

Id. Alexander Hamilton, in writing an installment of the Federalist Papers, was surely cognizant of this fact when he noted that "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" THE FEDERALIST NO. 79, at 528 (emphasis in original). Turning back to Blackstone, one discovers that "every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny." I BLACKSTONE, *supra* at *126. By

directing students' funds to support the advocacy of ideas they would rather not promote, the University has usurped their will in this arena. The only cause the University has offered as justification for this action is the support of groups and ideas that would otherwise founder for lack of funds. But as already demonstrated, this rationale is foreign to United States jurisprudence and our common law heritage. In the Blackstone/Hamilton formulation, then, the University's policy constitutes a "degree of tyranny."

Thomas Jefferson once said that "it does me no injury for my neighbor to say there are twenty gods, or no god[:] It neither picks my pocket nor breaks my leg." JEFFERSON, *supra* at 231. The students of the University of Wisconsin are having their pockets picked through the forced advocacy of ideas with which they disagree by means of compelled contribution to the segregated fund.

II. HARMONY BETWEEN HISTORICAL PRINCIPLES AN CONTEMPORARY DECISIONS.

A. Distinction Between Money Contributed to Fund and Withdrawn Therefrom.

Petitioners appear to argue that the District Court's opinion is somehow inconsistent with the results obtained in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). To the contrary, the Court's decision fits perfectly within the Supreme Court's constellation of cases involving access to university-collected funds and use of university properties, and constitutes a worthy addition to the firmament. In any such situation, there are two distinct but related

concerns. The first addresses who may receive funds made available through state action. The second concerns who is required to contribute to that fund. Part of Petitioner's disagreement with the decision below perhaps stems from the difficulty of grafting an analysis meant for the first question onto the second.

As Petitioners recognized, the Supreme Court in *Rosenberger* reached its decision on who may have access to a pool of funds created through state action by analogizing that pool to a forum, albeit one "more in a metaphysical than a spatial or geographic sense." 115 S.Ct. at 2517. That analysis, though apparently stretched to its limits, still functioned sufficiently well for the Court to conclude that distribution of funds must be accomplished in a content-neutral fashion. The analogy, however, does not travel well to the instant situation in which this Court must determine whether one can be required to contribute to a fund that will inevitably be used for the direct advancement of ideas with which one disagrees.

A better analogy may be that of money laundering. When one wishes use of improperly obtained funds, one often places it with an institution holding legitimately obtained funds, e.g., a bank. The fungibility of money thus makes it difficult to trace the tainted funds once they are withdrawn to be put to lawful ends. There can be no doubt, though, that the legitimate activity would not be possible but for the initial introduction of the tainted money. The fact that the withdrawal was lawful and the ends to which the money will be applied are legitimate does nothing to remove the fact that the money still bears its initial stain.

The student groups at the University of Wisconsin are participating in legitimate and, in many cases, laudable activity. The Associated Students of Madison is performing a valuable service in ensuring that worthwhile student organizations receive funding for their functions. How they distribute those funds, and the identity of the groups receiving the money, however, will not legitimize the money if it was obtained unconstitutionally. Because "forum" analysis is keyed to the distribution and receipt of funds whose legitimacy is unquestioned, it can do nothing in resolving the question of whether the contributions to the fund were obtained in a Constitutionally permissible manner.

Petitioner's argument breaks down at this point, for it assumes that laundering the money through a content-neutral distribution process to legitimate student groups removes any stigma that may have attached to the money before that process began. Just as the question of who may receive funds from a pool of money is different from who must contribute, so are the analyses different.

B. Parity in Protection Against Censorship and Compulsion.

Contrary to Petitioner's suggestion, involuntary participation in the promulgation of an idea with which one disagrees is protected against with at least the same level of solicitousness as prohibiting governmental action restricting free speech:

> It is a commonplace that censorship or suppression of expression of opinion is

> tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. *It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence* . . . . To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 633-34 (1949) (emphasis added). The Supreme Court reiterated the importance with which it held the right not to be compelled to speak in *Wooley v. Maynard*, 430 U.S. 705 (1977):

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *See Board of Education v. Barnette*, 319 U.S. 624, 633-634 (1943); *id.*, at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." Id.*, at

637.

430 U.S. at 714 (emphasis added). That the State seeks to promote religious, political or ideological causes with a blind eye is wholly irrelevant.[5] The right to remain silent defies application of a standard that asks whether competing ideas are treated even-handedly.

The State must "presume that speakers, not the government, know best both what they want to say and how to say it. . . . [E]ven with the purest of motives, [the government] may not substitute its judgment as to how best to speak for that of speakers and listeners . . . ." *Riley v. Nat. Fed. of Blind*, 487 U.S. 781 (1988). Justice Stewart recognized that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977). The Supreme Court has recognized that "[m]aking a contribution . . . enables like-minded persons to pool their resources in futherance of common political goals." *Buckley v. Valeo*, 424 U.S. 1 (1976). The corollary principle is also true: If the contribution is compelled, the goals furthered are, by definition, alien to the will of the contributor.

While it is true that some legitimate governmental activities have the incidental effect of promoting an idea, or

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[5] Even the State's professed blindness to the ideologies that are promoted through use of the segregated fees is suspect. Surely the University must have peeked beneath its blindfold in determining that some groups were not receiving adequate funding, for if all were receiving adequate amounts of money there would be no need of this type of financing.

even several, to the relative detriment of others, government policy ought not be allowed to have as its motivating purpose intervention in the marketplace of ideas in such a way that it disturbs the natural balance therein. Justice Murphy's concurring opinion in *Barnette* contained the seeds of this standard:

> The right of freedom of thought . . . as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society – as in the case of compulsion to give evidence in court.

Barnette, 319 U.S. at 645 (Murphy, J. concurring). In this case, the University acknowledges that the central purpose for its financing scheme, as it relates to the student groups, is to promote debate. When the result of that avowed purpose is to skew the marketplace, the government has stepped outside its proper boundaries.[6]

The District Court decision fills the gap identified by Justice O'Connor in *Rosenberger*, when she noted "the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be

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[6] This is significantly differen6t from making a facility or park available to all who should seek its use. Such provision does nothing to alter the number of advocates in the marketplace or affect the efficacy with which they can promote their agendas.

compelled to pay for speech with which she disagrees." *Rosenberger*, 515 U.S. at 851 (O'Connor, J. concurring). Whereas cases such as *Rosenberger* adequately apply a "forum" analysis to the expense side of the ledger, the income side requires the Court to ascertain whether the purpose of the compelled contribution is Constitutionally permissible. If the purpose of the requirement is to affect the balance of the marketplace of ideas, as here contributions must be voluntary to survive scrutiny. On the other hand, if the motivating purpose of the regulation is not to promote an idea, or group of ideas, and yet has the incidental effect of doing so in pursuance of otherwise legitimate governmental function, the regulation survives review. The District Court decision ensured that the pool of funds is not contaminated by unconstitutional compulsion, and faithfully followed the history of the First Amendment and the *Abood, Maynard, Riley* and *Barnette* decisions.

III. CONCLUSION

The First Amendment's guarantees grew out of the experience of people whose governments had tried to coerce assent to ideas, and even systems of science, with which they disagreed. Their goal was to create a jurisdictional moat around matters of the mind that the government would be unable to ford. This they expressed by placing religion, speech and the press off-limits to State regulation.

This Court has the opportunity to clarify the different analyses applicable to the two sides of the ledger of a governmentally created fund. "Forum" analysis provides a workable structure only when addressing expenses paid from

the fund. Income deposited in the fund, though, must be screened for compulsion. If the purpose of the fund has only the incidental effect of promoting the expression of an idea or ideas, there is no Constitutional harm. However, if the purpose of the money, at least in part, is to promote the advocacy of ideas or opinions, the First Amendment prohibits compelled contribution. As Jefferson has said before, "to compel a man to furnish contributions of money for the propagation of the opinions which he disbelieves, is sinful and tyrannical." For these reasons, *amicus* urges this Court to affirm the District Court's decision in this case.

Respectfully submitted,

ROY H. NELSON
Petrie & Stocking, S.C.
111 E. Wisconsin Ave.
Suite 1500
Milwaukee, WI 53202
(414) 276-2850

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Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

THOMAS C. BERG
800 Lakeshore Drive
Birmingham, AL 35229-7021
(205) 870-2774

STEVEN T. MCFARLAND
Counsel of Record
SAMUEL B. CASEY
CHRISTIAN LEGAL SOCIETY
CENTER FOR LAW AND RELIGIOUS FREEDOM
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the First Amendment's rights of religious exercise, speech, and association protect students at a state university from being compelled, through a mandatory student activity fee, to support organizations that take political or ideological positions contrary to the students' deep convictions of conscience. The court of appeals held that the First Amendment does prohibit such compulsion, relying on this Court's decisions holding that neither unions nor state bar associations could compel their members to support political or ideological groups to which they are conscientiously opposed. See *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991). *Amicus* the Christian Legal Society agrees with respondents and the court of appeals that the imposition of a student activity fee at a state university is subject to the same First Amendment restrictions as the imposition of fees by unions and state bar associations. We further

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[1] No counsel for either party authored this brief in whole or in part. The Alliance Defense Fund helped defray the expenses of preparation of this brief.

agree that under the approach of *Abood*, *Keller*, and *Lehnert*, students may not be compelled to pay that portion of the activity fee that goes to groups to support political and ideological activity that the students oppose.

The primary purpose of this brief is to address a central argument advanced by the University and its supporting *amici*. They suggest that protection of students' rights not to be forced to fund causes they oppose is inconsistent with this Court's holding in *Rosenberger v. Rectors of Univ. of Virginia*, 515 U.S. 819 (1995), that a state university may not discriminate on the basis of viewpoint in disbursing funds raised by a student activity fee. In effect, the University claims that when student activity funds are distributed to groups on a viewpoint-neutral basis, *Rosenberger* forbids any student to object to being forced to fund any particular group, no matter how much the student abhors the group's doctrines. Under the University's position a black student might be forced to contribute money that is given to the Ku Klux Klan, or a Jewish student money that is given to a neo-Nazi group.

The University's argument misapprehends the basis for both *Rosenberger* and the *Abood/Keller* line of decisions, and therefore conjures up a conflict where none exists. *Rosenberger* concerns the disbursement of funds and requires that the state itself be viewpoint-neutral in such disbursement, while the court of appeals' decision (following *Abood* and *Keller*) concerns the collection of funds and simply protects a private individual's right to refuse to provide money to groups he opposes. Indeed, as we will show, both the viewpoint-neutral disbursement of funds and protection of objecting students' rights serve the same fundamental interest: keeping a state university

in a posture of respecting individual students' choices concerning sensitive matters of conscience like politics, ideology, and religion.

The University and its supporting *amici* predict dire consequences from recognizing the students' rights against compelled association in this context, but those warnings are unfounded. The doctrine of *Abood* and *Keller* has always been limited to fees imposed by certain limited-purpose state-created entities, such as the fee charged by the University here, as opposed to the expenditure of some portion of general tax revenues by the general government. The doctrine has also been limited to a separable fee, or fee component, imposed for the specific purpose of funding speech, lobbying, and other forms of expression. For these reasons, protecting the students' rights here will not threaten programs of the general government, which are not only funded from general tax revenue, but which also usually serve substantive governmental goals apart from just the promotion of free expression. Likewise, protecting students against compulsion here will not endanger the funding of faculty activities, auditoriums or other physical fora. As we will discuss, pro rata opt-outs from payments attributable to these elements would indeed compromise "vital [educational] interests" across the board, and therefore may be denied under *Abood*, *Keller*, and *Lehnert*.

ARGUMENT

1. The Compelled-Support Doctrine Of *Abood* And *Keller* Properly Governs This Case And Is Fully Consistent With This Court's Decision In *Rosenberger*.

In *Rosenberger v. Rectors of Univ. of Virginia*, 515 U.S. 819 (1995), this Court held that a state university, in disbursing funds from a mandatory activity fee collected from students, may not set a criterion for student organizations receiving funds that discriminates based on the viewpoint espoused by the organization. In particular, the Court held that "for the University to deny eligibility [for funds] to student publications because of their viewpoint" violated the Free Speech Clause and was not required by the Establishment Clause. *Id.* at 845. The Christian Legal Society strongly supports the result in *Rosenberger*, having filed an *amicus curiae* brief in that case supporting the requirement that a state university act on a viewpoint-neutral basis in disbursing funds from student activity fees.

The University argues that *Rosenberger* forbids the recognition of any First Amendment right for a student to object to that portion of his mandatory activity fee that supports political and ideological activities to which he is conscientiously opposed. The University asserts that the right to object to such state-compelled support, recognized in *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), disappears whenever a wide range of student organizations are eligible to receive disbursements from the student activity fund on a viewpoint-neutral basis. In

short, the University claims that the principles of *Rosenberger* are in tension with those of *Abood* and *Keller*, and that in this purported conflict the rights against compelled speech and association recognized in *Abood* and *Keller* must be subordinated and limited.

At the outset, we question the University's premise in equating the student-fee funding program here with a true public forum such as a park, or university rooms made available to all student groups (see *Widmar v. Vincent*, 454 U.S. 263 (1981)). The decisionmakers here, the student government and the Board of Regents, have much more than a ministerial role in allocating the funds raised by the activity fee. The student government reviews detailed applications filed by student groups and determines how much money each organization is eligible to receive. See Respondents' Brief in Opposition at 3, 16-17 (citing record). Although many groups receive some money, most receive very little, while in the 1995-96 school year "[a] select group of 17 campus organizations received large allotments . . . ranging from $6905.00 to $481,673.00 each." *Id.* at 3 (citing record). In contrast, in a full-fledged public forum such as a park, or the set of classrooms in *Widmar*, the government's role is generally limited to scheduling access to the forum. The government's added role here in funding decisions calls into doubt the University's claim that the students are simply contributing to the funding of a wholly neutral public forum.

Even assuming that the student-fee funding program equates with other, full-fledged public fora, the University's attempt to conjure up a conflict between *Rosenberger* and *Abood/Keller* is seriously misguided. The two lines of

decisions pose no conflict once it is recognized that *Rosenberger* deals with state conditions on eligibility for receiving disbursements of funds, while *Abood*, *Keller*, and *Lehnert* deal with the compelled collection of funds from persons who object to particular ideological uses of the funds. Indeed, as we will show, the two lines of decisions work in harmony, together assuring that the support of sensitive political and ideological expression will generally reflect the conscientious choices of students rather than compulsion or favoritism by state university decisionmakers.

There is certainly no logical conflict between the principles of *Rosenberger* and those of *Abood* and *Keller*. As the court of appeals put it, *Rosenberger* "considered only the disbursement of student activity fees; it did not consider the constitutionality of forcing students to fund private political and ideological organizations." 151 F.3d at 723 n.3. It is perfectly consistent to hold, as *Rosenberger* did, that a university may not exclude an organization from receiving funds, or otherwise discriminate against it in eligibility, according to its viewpoint – and at the same time hold, under *Abood*, *Keller*, and *Lehnert*, that the university may not collect or pass on funds from students who conscientiously object to supporting the organization in question. Courts can consistently hold, for example, that a university may not disqualify a student group from receiving any student activity funds simply because it expresses anti-Semitic views, and also that a Jewish student may object to that portion of his fee that goes to support the anti-Semitic views. The latter holding does not require the state university to set any condition of its own excluding certain viewpoints from receiving funds.

Rather, following *Abood* and *Keller* merely respects the conscientious decision of private individuals, the students, not to contribute funds to a viewpoint with which they disagree. The University still may raise funds from non-objecting students, and it still must distribute those funds in a viewpoint-neutral manner under *Rosenberger*.

Rosenberger itself treated the principles it announced as compatible with those of the *Abood/Keller* line of decisions because the two involved different aspects of the student-fee process. *Rosenberger*, in dealing with the issue of university discrimination in disbursements, emphasized that "we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe." *Rosenberger*, 515 U.S. at 840. The Court at that point cited *Keller* and *Abood*, indicating that those decisions should govern the distinct claim concerning the collection of funds. See also *Rosenberger*, 515 U.S. at 851 (O'Connor, J., concurring) (also citing *Keller* and *Abood* in suggesting possibility of "a Free Speech challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees"). These explicit citations belie the argument that *Abood* and *Keller* can have nothing to do with this case merely because a wide range of student organizations receive funds. Accord *Curry v. Regents of University of Minnesota*, 167 F.3d 420, 422 n.4 (8th Cir. 1999) (stating, in analogous case, that "[t]he nondiscriminatory distribution by University of funds available for the support of student organizations as required by *Rosenberger* . . . is not at issue in this action

because the University's system for distributing the fees collected has not been challenged by the plaintiffs").

In short, by ignoring the distinction between (i) *state*-imposed conditions on eligibility for the receipt of funds and (ii) *private individuals'* objections to being compelled to provide support to activities they oppose, the University manufactures a supposed tension between *Rosenberger* and *Abood/Keller*. It then resolves that supposed tension by arguing that a student's right to refuse to provide money to groups she opposes simply vanishes when those groups are included among "the speech of many groups [funded] on a viewpoint-neutral basis." Br. for Petitioners at 23 (arguing that "the principles [of *Abood*, *Keller*, and *Lehnert* are] inapposite in this University setting"). This attempt to narrow the *Abood/Keller* line of decisions is inconsistent with their express language and underlying principles.

Nothing in *Abood* or *Keller* suggests that the right to object to compelled support there depended on a finding that the state had supported certain causes over others in a non-neutral fashion. The constitutional violation was not that the state actor favored some viewpoints or causes over others, but rather that the state actor, whatever else it did, required the objector to pay funds that went to support organizations promoting causes with which the objector deeply disagreed. The Court explained that the state actor had required the objector "to contribute to the support of a cause he may oppose" (*Abood*, 431 U.S. at 235), and that, in the words of Thomas Jefferson, " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " *Keller*, 496 U.S. at 10; *Abood*, 431 U.S. at

234 n.31 (both quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). *Abood* and *Keller* require that expenditures " 'must be financed from charges, dues, or assessments paid by employees who [do] not object to advancing those ideas and who [are] not coerced into doing so against their will.' " *Keller*, 496 U.S. at 10 (quoting *Abood*, 431 U.S. at 235-36) (brackets inserted). The right recognized in *Abood* and its progeny is a right of noncompulsion, not a right of neutrality.

Even if the mandated fee funds a whole host of causes based on purely ministerial, viewpoint-neutral conditions, the objector has still been compelled, through part of the fee, to "furnish contributions of money for the propagation of opinions which he disbelieves." For example, the fact that the University here funds a variety of student ideological expression and lobbying would not dispel the fact that it had taken some money from a Jewish student and given it to an anti-Semitic group, or some money from a student who believes abortion is murder and given it to a group lobbying for unrestricted abortion. The unions in *Abood* and *Lehnert* could and doubtless did fund a wide variety of political and ideological causes unrelated to collective bargaining, but they still were required to deduct the pro rata share collected and passed on from members who objected to the particular individual use of that share. And the state bar association in *Keller* could and did lobby on a variety of political issues not directly related to legal practice – from mandatory polygraph tests for state employees, to restrictions on the importation of workers from other countries, to initiatives for gun control and a nuclear-weapons freeze (496 U.S. at 6 n.2) – but it still had to reduce pro

rata the share collected and passed on from lawyer members who objected to the particular use of the share.

In the face of the clear language and rationales of *Abood* and *Keller*, the University and its supporting *amici* struggle to establish that compelled support of an objectionable group is not compelled support when the group is part of a large number of organizations in a broad forum. See, e.g., Br. for Petitioners at 29 (collection of fee "is not properly regarded as compelled speech"). But the distinctions that the University and its supporters offer cannot stand under this Court's longstanding jurisprudence concerning compelled speech and association.

For example, the University and several *amici* argue that when the student fee goes to support a public forum of student groups, no observer will reasonably think that the objecting student endorses the speech to which he objects. See, e.g., Br. for Petitioners at 30 ("there is neither representation nor perception that the organizations receiving funding . . . reflect the views of . . . all students").[2] But such an attribution is not a necessary condition for a compelled-speech violation; if it were, many of this Court's previous decisions would have to be overturned. Few if any observers think that all union members endorse all their union's lobbying activities, or that

[2] See also, e.g., Brief of American Civil Liberties Union (ACLU), *et al.* at 16-17 ("it is implausible to argue that the private political speech of student groups at UW will be attributed to respondents merely because respondents' student fee helped support the public forum"); *id.* at 19 (student groups "do not purport to represent respondents' views").

all lawyers in a state endorse their bar association's political stances; yet *Abood* and *Keller* still treated these situations as unconstitutionally compelled speech. Likewise, no one would think that a newspaper forced to print a reply from a political candidate it had criticized endorses or adopts that reply, yet this Court held that requiring such a right-of-reply violates the newspaper's First Amendment rights by compelling it to support the candidate's speech. *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). The Court also forbade a state to require car owners to display a license plate carrying an ideological motto to which they objected (*Wooley v. Maynard*, 430 U.S. 705 (1977)) – even though, as the dissent observed, displaying the plate as all citizens do "carrie[d] no implication that [the objecting car owners] endorse that motto or profess to adopt it as a matter of belief." *Id.* at 721-22 (Rehnquist, J., dissenting). And the Court struck down a state requirement that a utility include in its quarterly billing statements messages from a consumer group, even though few observers would assume that the utility agreed with the group's messages. *Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. 1 (1986). See also Abner S. Greene, *The Pledge of Allegiance Problem*, 64 Fordham L. Rev. 451, 483-86 (1994) (showing that few compelled speech cases involve attribution of views to the objector).

These decisions make it clear that there can be unconstitutional state compulsion on an individual to support speech even though no one will actually believe that the individual agrees with the speech. The court of appeals, therefore, correctly concluded that "[i]t matters not

whether a third party attributes the organization's political and ideological views to the objecting student." *Southworth v. Grebe*, 151 F.3d 717, 732 (7th Cir. 1988).

Likewise, it also does not matter that the objecting students here are free to disavow the views of groups that they oppose (see, e.g., Br. for Petitioners at 34; Br. of ACLU, *et al.* at 16). The newspaper in *Tornillo*, the automobile owner in *Maynard*, and the utility in *Pacific Gas* each had ample opportunity to disclaim any agreement with the views they were compelled to support. See, e.g., *Pacific Gas*, 475 U.S. at 16 n.11 (possibility of disclaimer might dispel any impression of endorsement, but did not dispel compulsion of speech); *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting) (noting that "any implication that [car owners] affirm the [license plate] motto can be easily displaced" by adding a bumper sticker expressing their disagreement). Yet the Court still found a violation of the First Amendment in each of those cases.

The University cites *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), which held that the state did not violate a shopping center owner's rights by requiring him to allow groups to speak on his property. *Pruneyard* did refer to the wide range of groups being supported and the possibility of a disclaimer to show that the property owner was not being associated with the views of any group. But the compelled-support framework of *Abood* and *Keller* constitutes a distinct category of compelled-speech claims that does not depend on any direct effect on the objector's own speech. See *Pruneyard*, 447 U.S. at 98 n.2 (Powell, J., concurring in the judgment) ("Even if a person's own speech is not affected by a right of access to his property, a requirement that he lend

support to the expression of a third party's views may burden impermissibly the freedoms of association and belief.") (citing *Abood*).

More precisely, the *Abood/Keller* analysis applies to compulsion by "specialized" entities (*Keller*, 496 U.S. at 12) created by the state "to provide a special service for a discrete group of people." Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities*, 82 Minn. L. Rev. 1425, 1454 (1998). When such a limited-purpose entity goes beyond providing those specific services and into supporting ideological activity, the First Amendment as interpreted in *Abood* and *Keller* limits the entity's ability to extract fees from the discrete group it is supposed to be serving. The University, and particularly the student decisionmakers allocating the activity-fee fund, are analogous to unions and bar associations: the state has given them the specific task of providing and advancing educational and campus-related services for the University's student body. It is entirely appropriate to apply *Abood* and *Keller* to ensure that mandatory student fees are confined to those purposes, and not diverted to activities such as lobbying against Nigerian imports, protesting a black church's opposition to homosexuality, and other political, ideological, off-campus activities shown in the record of this case (see Respondents' Br. in Opp. at 4-9).

The proper distinction, therefore, is not between compulsion to support causes or organizations and compulsion to support them as part of an open forum. Rather, the distinction is between the state imposing its own conditions on an organization's eligibility for funds –

where, under *Rosenberger*, the conditions must be viewpoint-neutral – and the individual student objecting to particular uses of a share of his compelled fee – where, under *Abood* and *Keller*, the individual has a right to object based on the ideological viewpoint that the share will go to support. Applied to this case, the rule of *Abood* and *Keller* does not put the University in the position of discriminating on the basis of an organization's viewpoint; it simply requires the University to respect, on a neutral basis, the individual student's choice of whether or not to support particular political or ideological activities. What *Rosenberger* disapproved was "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students." 515 U.S. at 836. A university expresses no such disapproval itself when it merely respects the choice of each student not to support lobbying for ideologies she opposes. *Rosenberger* required that a university allocate student funds based on "some acceptable neutral principle" (*id.* at 835); respecting and implementing student choice across the board, with respect to any viewpoint a student finds abhorrent, is indeed such a neutral principle.

As such, the rule of *Abood* and *Keller* is not just reconcilable with the principles of *Rosenberger*; the two actually work together in harmony. Both decisions work to ensure that the support of sensitive political and ideological expression will generally reflect the conscientious choices of individuals rather than compulsion or favoritism by state decisionmakers. *Abood* and *Keller* obviously serve this principle by preventing state actors from exacting that portion of a mandatory fee that would support causes that the objector conscientiously opposes. But the

holding of *Rosenberger* serves this purpose as well. As we argued in our amicus brief in *Rosenberger*, forbidding any state-imposed condition that excludes a group from eligibility for funds because of its viewpoint (in that case a religious one) generally serves the purpose of keeping the state in a posture of "substantive neutrality," minimizing the effect that the state's own rules have in either encouraging or discouraging students to choose or support that or any other viewpoint. Brief *Amici Curiae* of Christian Legal Society, *et al.*, at 6 (filed 12/15/94).

If a forum for student group expression funded by student activity fees is to reflect the choices of individual students with as little distortion as possible, then any reduction in allocation to a group must be limited to the pro rata amount attributable to those who object to supporting the group's activity. The objecting students here seek only that remedy, of course: they have never challenged the University's right to use "the allocable portion of *non-objecting* students' activity fees to fund" ideological activity. *Southworth*, 151 F.3d at 721 (emphasis added); *id.* at 734 (vacating part of district court injunction that "fail[ed] to limit itself to fees paid by objecting students").[3] Denying a student organization access to funds altogether – as the University of Virginia did to the student religious publication at issue in *Rosenberger* –

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[3] Some of the *amici* supporting the University simply ignore this fundamental distinction. See, e.g., Brief of United States Student Association, *et al.* at 7, 16 (arguing that the court of appeals' decision compels the University "to exclude organizations that take political or ideological positions" and requires "the exclusion of certain organizations from the University's forum").

distorts individuals' choices by denying the organization the benefit of support from those students who have no objection to giving it (either because they do not disagree with the group or because they do not object to funding it even though they disagree with it). The kind of state-imposed denial of eligibility at issue in *Rosenberger* disfavors the excluded student group, thus discouraging the expression of its viewpoint, far beyond the extent necessary to protect the choice of those who object to funding the group. The state-imposed exclusion from eligibility, therefore, has the overall effect of distorting, rather than reflecting and implementing, students' choices with respect to the support of political or ideological activity.

By contrast, the combination of nondiscriminatory access under *Rosenberger* with a pro rata "opt out" under *Abood/Keller* serves and implements student choice. Under this combination of rules, the amount of support that flows to various ideological organizations from a mandatory student fee is a function of those who wish to support the organization, or at least have no objection to doing so. Such an approach lets the expression of each political or ideological student organization "flourish according to the zeal of its adherents and the appeal of its dogma" (*Zorach v. Clauson*, 343 U.S. 306, 313 (1952)), rather than according to compulsion by the state.

Such an arrangement does not, as some *amici* claim, amount to imposing a "heckler's veto" on unpopular speech (see, e.g., Br. of ACLU, *et al.* at 22). The partial opt-out from funding does not prevent any group from speaking, nor does it impose a fee or any other restriction on a group. Indeed, student groups flourish at the University without seeking or receiving any funding from

the fee; of more than 600 registered student organizations, almost 450 of them (approximately 75 percent) receive no funding. Respondents' Br. in Opp. at 2 (citing record). Unlike the "heckler's veto," the court of appeals' ruling does not shield any student from being exposed to political or ideological speech and lobbying because he disagrees with it; it merely protects each student from being forced to be an instrument of promoting such speech and activity.

For these reasons, the framework of *Abood*, *Keller*, and *Lehnert* applies to the collection of activity fees to fund a range of student groups. Under those decisions, the allocation of a share of student activity fees from objecting students must meet a three-part test showing, in essence, that the particular use is sufficiently "germane" to the University's mission. See *Lehnert*, 500 U.S. at 519. We also agree, for the reasons set forth in the court of appeals' opinion and the petitioners' brief, that the allocation of fees to support a number of the political or ideological activities shown in the record of this case is not sufficiently germane to education to justify compulsion against objecting students.

2. Affirming The Students' Rights Against Compelled Support In This Defined Context Will Not Undercut Other Government Programs And Expenditures.

The University and its supporting *amici* predict horrendous results if students are permitted to challenge the compelled funding of political and ideological activities they oppose. But the *Abood/Keller* approach, as applied

by the court of appeals here, contains a number of limiting principles that make the University's dire warnings unfounded.

2.1 First, the University and some *amici* suggest that protecting the students' rights here would allow them to object to classroom teaching with which they disagree and to seek a pro rata reduction in their tuition.[4] But the funding of faculty through general tuition revenues obviously differs from a separable activity-fee component supporting only lobbying and other ideological expression by student groups.

In the first place, this Court has never applied the *Abood/Keller* framework to expenditures funded out of unsegregated general revenues; rather, previous decisions have always distinguished general tax revenues from specific fees aimed at supporting ideological activities or expression. See, e.g., *Keller*, 496 U.S. at 12-13; *Rosenberger*, 515 U.S. at 841 ("Our decision [concerning student fees] cannot be read as addressing an expenditure from a general tax fund."); accord *Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976) (rejecting free speech challenge to "appropriation from the general revenue" to fund election campaigns because "every appropriation by Congress uses public

[4] See, e.g., Brief of States of New York, *et al.* at 18-19 (warning that students could "likewise object to that portion of their tuition payment which supports academicians who voice controversial political viewpoints through their university research and professional writings"); Brief of American Council on Education, *et al.* at 11 (claiming that students "could challenge tuition payments that supported research, faculty appointments, class topics, or lectures with which they philosophically disagreed").

money in a manner to which some taxpayers object").[5] Therefore, although there are some distinctions between university tuition and general taxes, it is questionable whether *Abood* and *Keller* would apply to expenditures funded from general university revenues.

More importantly, even under the *Abood/Keller* approach, the funding of faculty unquestionably is sufficiently germane to a university's basic educational mission, and any student claim to the contrary would be dismissed as frivolous. The decision in *Lehnert*, which the court of appeals correctly applied here, says that the mandatory collection of a fee must satisfy three conditions or else it violates an objector's rights against compelled support of and association with speech. See 500 U.S. at 519 (opinion of Blackmun, J.).[6] Under the first

[5] The reasons for this distinction are both conceptual and practical. General revenues fund a whole host of activities, many of them central to the operation of the organization in question; the individual contributing to such revenues can in no way assert that he is being compelled overall to support pure speech. In addition, the practical difficulties would multiply vastly if the task were to identify and separate that minuscule portion of general, unsegregated revenues that went to fund speech to which the dissenter objected. By contrast, a specific fund aimed at promoting expression, which is never mixed with other funds, presents far fewer practical difficulties: as Justice O'Connor put it in *Rosenberger*, "a fee of this sort appears conducive to granting individual students proportional refunds." 515 U.S. at 851 (O'Connor, J., concurring).

[6] As the court of appeals correctly found, these three factors, though set forth in a plurality opinion, constitute a holding of the *Lehnert* Court because a fifth justice agreed with the factors (though not with the plurality's application of them). See *Lehnert*, 500 U.S. at 534 (Marshall, J., concurring in part and

condition, activity by faculty, who teach the courses that the University offers to students, is obviously "germane" to the University's basic purpose of education; if teaching is not germane, then no activity is. It is entirely different, however, to say that student lobbying for various kinds of legislation, from tax cuts to abortion rights – as many of the groups in question here did – is germane to the educational process. As the court of appeals recognized, such an unlimited reading is inconsistent with this Court's previous interpretations. See *Southworth*, 151 F.3d at 724-25. *Keller*, for example, rejected the bar association's claim that "advanc[ing] a gun control or nuclear weapons freeze initiative" was germane to the association's mission of "regulation of the legal profession." 496 U.S. at 15. And *Lehnert* forbade a teacher's union to compel objecting members to support public relations and lobbying campaigns for greater state subsidies to education, even though the union (quite plausibly) argued that such efforts might have some effect in improving the situation of its member teachers. 500 U.S. at 527, 528-29.

The funding of faculty easily satisfies the other two requirements of *Lehnert* as well, because the funding of a faculty member's teaching activities cannot be separated from the faculty member's other university-related activities. If faculty salaries were reduced on a pro rata basis according to student objections, a university would find it

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dissenting in part) (joining part II of the plurality opinion, which adopted the three factors). In *Air Line Pilots Assn. v. Miller*, 523 U.S. 866, 118 S. Ct. 1761, 1766 (1998), this Court treated the three-prong test as *Lehnert*'s full-fledged holding.

harder to attract qualified faculty to do the essential work of teaching. All students receive educational benefits from the work of the various teachers at a university, and if some students were allowed to withhold tuition because of objectionable faculty activity, the whole teaching enterprise would suffer. The support of faculty, therefore, plainly meets *Lehnert*'s second condition; it is "justified by the government's vital policy interest in [education] and avoiding 'free riders.' " 500 U.S. at 519. For similar reasons, the support of faculty through tuition revenues meets the third *Lehnert* condition; it does "not significantly add to [any] burdening of free speech that is inherent" in the state operating and subsidizing a university in the first place. See *id.*

2.2 The University and its supporting *amici* also suggest that protecting the dissenting students here would allow dissenters "to opt out of sharing the costs of constructing an auditorium, classroom or other public space where ideas they object to might be expressed." Br. for Petitioners at 32. Again, however, to the extent that such facilities are funded out of general university revenues (as is typical), we doubt that the *Abood/Keller* framework even applies. Moreover, the provision of such facilities, like the maintenance of a teaching faculty, cannot be divided and allocated to different groups. If some portion of funding for an auditorium is withdrawn because of *Abood*-type objections, the resulting reduction in the facility's size or maintenance will adversely affect the forum as a whole, not just the activity of those groups to whom the dissenting students object. Because the result will be to hobble the forum altogether, rather than just reduce the funds to particular groups based on student choice,

the University would have the kind of "vital interest" in denying any opt-outs that *Lehnert* demands, and the compulsion on students would be no greater than is inherent or necessary to support the forum in the first place. By contrast, as we have already noted, the record here shows that the denial of funds to individual groups does not significantly affect the vitality of any forum. As of 1995-96, nearly 450 student organizations existed and operated at the University without receiving any activity-fee funding, almost 75 percent of the total number of student organizations.

2.3 Finally, the University implies that upholding the students' rights here would permit taxpayers to object to "a state political subdivision's providing funding to private organizations for the provision of community services." Br. for Petitioners at 35. This contention is outlandish, however, and we urge the Court to identify it as so. Again, there are two dispositive differences from this case. First, as has already been discussed above, the right against compelled support has never applied to tax-supported expenditures of the general government or "traditional government agencies." *Keller*, 496 U.S. at 13 (distinguishing "the very specialized characteristics" of state bar association "from the role of the typical government official or agency"). As we have already discussed, the University, and more precisely the student government decisionmakers who allocate activity fees, constitute a special limited-purpose entity analogous to a union or bar association rather than a traditional government agency.

In addition, a program "for the provision of community services" (whether education, social welfare services,

health care) differs from a program whose purpose is simply to facilitate private groups' expression. In the former case, the government is funding private organizations not to facilitate their expression, but rather to obtain the services they provide. The individual is being compelled to support the services that the organization provides, not the ideological speech in which the organization engages; and consequently the compelled-speech framework of *Abood/Keller* is simply inapplicable. Passages in both *Keller* and *Abood* make clear that government cannot be hampered in achieving substantive policy goals by objections from individual taxpayers. See, e.g., *Keller*, 496 U.S. at 13, quoting *United States v. Lee*, 455 U.S. 252, 260 (1982) (" 'The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs.' "); *Abood*, 432 U.S. at 259 n.13 (Powell, J., concurring in the judgment) ("Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends money in ways the taxpayer finds abhorrent."); see also *Buckley*, 424 U.S. at 92 (rejecting free speech challenge to tax-supported funding of elections because "every appropriation made by Congress uses public money in a manner to which some taxpayers object").

To be sure, when the government funds a wide range of private organizations that provide a desired service, the whole gamut of speech of those organizations does not become the government's speech. If that were true, then religious organizations providing such services would be disqualified from participating in such a neutral program of funding, since the Establishment Clause

prohibits the government itself from engaging in religious speech – but this Court has made it more and more clear that religious organizations may constitutionally participate in programs of funding for services.[7] Thus, the government's ability to fund a range of private service providers without taxpayer opt-outs does not depend solely on the proposition that " 'government may speak despite citizen disagreement with the content of its message' " (*Keller*, 496 U.S. at 10-11 (quoting Brief for Respondent State Bar in *Keller*, at 16)). More precisely, it depends on the proposition that " 'government must take substantive positions' " and may pursue " 'legitimate goals' " (*id.*), and therefore it may legitimately cooperate with private organizations to achieve such shared goals without thereby taking on all of those organizations' expression as its own.

In contrast to such a program of funding service providers, the University of Wisconsin's activity-fee program can only be seen as supporting expression untied to any substantive policy goal. There is nothing in the policies of the University or the student government that suffices to restrict funding to organizations providing defined campus services, and not surprisingly numerous funded organizations have among their prime activities lobbying for contentious political and ideological causes often far removed from the campus. See Respondents' Br.

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[7] See, e.g., *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dept. of Services*, 474 U.S. 481 (1986).

in Opp. at 4-9 (detailing examples of political and ideological speech and lobbying on non-campus issues).[8] When as here, the overwhelming purpose of the fee exaction is to compel the support of speech, then correspondingly, in the words of Justice Powell, "[t]he withholding of financial support [from objectionable causes] is fully protected as speech" as well. *Abood*, 431 U.S. at 259 n.13 (concurring in the judgment).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS C. BERG
200 Lakeshore Drive
Birmingham, AL 35229-7021
(205) 870-2774

STEVEN T. MCFARLAND*
SAMUEL B. CASEY
CHRISTIAN LEGAL SOCIETY
CENTER FOR LAW
AND RELIGIOUS FREEDOM
4208 Evergreen Lane,
Suite 222
Annandale, Va 22003
(703) 642-1070

*Counsel of Record

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[8] These examples undercut the University's claim that all funded organizations advance the substantive condition of "provi[ding] services to a diverse student body" (Br. for Petitioners at 43) – except in the empty, tautological sense that any expression is (assertedly) a service to students.

APPENDIX

STATEMENT OF INTEREST

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit ecumenical professional association of 4,000 Christian attorneys, judges, law students, and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious belief and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980. These include *Widmar v. Vincent*, 454 U.S. 263 (1981); *Witters v. Washington Dept. of Services*, 474 U.S. 481 (1986); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993); *Rosenberger v. Rectors of Univ. of Virginia*, 515 U.S. 819 (1995); and *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997).

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence

(1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, 25 years of experience, and professional resources enable it to speak with authority upon religious liberty.

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No. 98-1189

IN THE
Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *et al.*,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING RESPONDENTS

JAY ALAN SEKULOW
Counsel of Record
MARK NATHAN TROOBNICK
JAMES MATTHEW HENDERSON, SR.
THE AMERICAN CENTER FOR LAW AND JUSTICE
1000 Thomas Jefferson Street, NW
Washington, DC 20007
(202) 337-2273

Attorneys for Amicus Curiae

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is a nonprofit, public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ attorneys have argued or participated as amicus curiae in this Court. *See, e.g., Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Frisby v. Shultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The ACLJ, because of its commitment to defending religious liberty and free speech, opposes the government compelling individuals to support political ideology which is religiously and philosophically abhorrent to them. The ACLJ is generally not in favor of state universities compelling students to contribute to groups with which they are ideologically opposed. Thus, the ACLJ urges this Court to uphold the decision of the United States Court of Appeals for the Seventh Circuit below.

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[1] Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no mandatory contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

SUMMARY OF ARGUMENT

Petitioner Board of Regents University of Wisconsin System and supporting amicus argue that this case presents issues involving the historical right of universities to academic freedom, however, that is inaccurate on two levels.

First, as a purely historical matter, American universities started using student fees for ideological purposes only fairly recently. Accordingly, if "a page of history is worth a volume of logic,"[2] then the history of this country reflects that this practice is not necessary for academic freedom at public institutions of learning.

Second, compelling someone to disseminate beliefs which are contrary to his own, is a fundamental violation of virtually every right in the First Amendment to the U.S. Constitution. Thus, while it is discriminatory to limit access to student funds because of a particular viewpoint, compelling association with an ideology is equally unconstitutional.

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[2] Comm. for Public Ed. and Rel. Lib. v. Nyquist, 413 U.S. 756, 777 n.33 (1973).

ARGUMENT

I. USE OF STUDENT FEES FOR IDEOLOGICAL PURPOSES IS A RELATIVELY RECENT PHENOMENON

Many groups argue to this Court that unless students are compelled to support causes and groups which are ideologically abhorrent to them, a historically permitted use of student fees will come to an abrupt end. That is an historically inaccurate depiction.

Historically, student fees were not used to support ideological activities. Instead, such fees funded core educational activities and capital improvements. *Cf. Litchman v. Shannon*, 155 P. 783 (Wash. 1916) (student fees used for construction of two buildings); *Lynch v. Comm'r of Ed.*, 56 N.E.2d 896 (Mass. 1944) (student fees used for books and school supplies); *Regents of University System of Georgia v. Page*, 18 F.Supp. 62 (N.D. Ga. 1937) (students fees used for athletic programs); *President and Fellows of Harvard College v. Attorney General*, 117 N.E. 903 (Mass. 1917) (student fees used for applied sciences); *Rainey v. Malone*, 141 S.W.2d 713 (Tex. 1940) (student fees used for student union facility); *Clipson v. State Board of Education*, 123 So. 2d 16 (Ala. 1960) (student fees used for construction of physical education building); *Iowa Hotel Association v. State Board of Regents*, 114 N.W.2d 539 (Iowa 1962) (student fees used for construction and renovation of buildings); *Spence v. Utah State Agricultural College*, 225 P.2d 18 (Utah 1950) (student fees used to pay principal and interest of construction bonds).

In an early Illinois case, it was necessary to determine whether the construction and maintenance of dormitories, dining facilities, and a student club house were for the "immediate conduct of the educational purposes of the institution," or rather for the purpose of producing revenue. *City of Chicago v. The University of Chicago*, 81 N.E. 1138, 1139 (Ill. 1907). While students contributed specifically to the maintenance of each of these facilities through rent, meal fees and membership dues, each facility was also supported generally by revenue from general student fees. Examining the historical background of American higher education, the court found dormitories and dining halls to have been an essential part of American universities since the American colonies began founding universities in the seventeenth century. The court similarly found the clubhouse, used for recreation and social purposes as well as various student meetings, much like today's student unions, to be maintained for the immediate conduct of the educational purposes of the institution. In discussing the application of student fees for the support of these facilities, the court declined to distinguish between a general student fee and one "apportioned as to sources of expense, as tuition, room rent, lecture fee, dining halls, etc." *Id.* at 1139–1140 (internal citations omitted).

In addition to the general university purposes discussed above, student fees during this time period were also used for the creation and maintenance of a student athletic association, specific scientific research projects, and the establishment of a campus student union. *See Regents of University System of Georgia v. Page*, 18 F.Supp. 62 (N.D. Ga., 1937) (a student fee imposed on all students was used to support the University of Georgia Athletic

Association and the Georgia Tech Athletic Association); *President and Fellows of Harvard College v. Attorney General*, 117 N.E. 903 (Mass. 1917) (student fees assessed in conjunction with specific courses were to be used in education generally and also for specific research in the Applied Sciences); *Rainey v. Malone*, 141 S.W.2d 713 (Tex. App. 1940) (student fee used to establish student union). In *Rainey* the court specifically addressed the issue of whether the legislature could legitimately authorize collection of the "Student Union Fee," as being "appropriately within the functions of a present day university." *Id. at 717* The Court found the Student Union to satisfy the functions of the university, providing "facilities for the conduct of various extra-curricular activities of social, recreational and educational natures; all of which are conducted or supervised under the direction of the Board of Regents in accordance with the above Subsection 19," which provides that the Board of Regents shall review annually all activities conducted and expenditures made during the previous year before approving the budget for the following year.

Thus, contrary to the assertions of some, use of student fees to support ideological causes and groups is of fairly recent vintage. In fact, some universities are prohibited from using student fees for political purposes. *See, e.g., Smith v. Regents of the University of California*, 844 P.2d 500, 515 n. 11 (Cal. 1993) ("Positions on issues taken by student governments shall not be represented as or deemed to be official positions of the University. Compulsory student fees shall not be expended in support of such positions except for University-related purposes").

A dramatic increase in student fee litigation arising in the 1970's shows the new and controversial uses of student fee money. In that decade alone, sixty state and federal cases containing a discussion of student fees were decided. The subject matter of this new litigation marked a significant departure from the early student fee cases. No longer were the challenges focused upon statutory authority to assess student fees, but rather the focus had shifted to the new purposes for which the fees were being expended. In each case, challenged expenditures fell within one of four categories.

Many of these student fee cases involved the expenditure of student fees for support of a campus newspaper advocating views offensive to some students, or containing explicit material offensive to students. *See, e.g., Arrington v. Taylor*, 380 F.Supp. 1348 (M.D.N.C. 1974), aff'd by the Fourth Circuit in an unpublished decision on August 4, 1975 (1975 U.S. App. LEXIS 13313); *Larson v. Board of Regents of the Univ. of Nebraska,* 204 N.W.2d 568 (Neb. 1973); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973).

Revisiting the issue first raised in 1969 by *Brooks v. Auburn University*, other cases involved a challenge to student fees being expended to fund controversial speakers in university guest lecturer programs. *See, e.g., Veed v. Schwartzkopf*, 353 F.Supp. 149 (D.C. Neb. 1973) (also challenging use of fees for student newspaper and student association); *Lace v. University of Vermont and State Agricultural College*, 303 A.2d 475 (Vt. 1973).

The third issue around which much controversy centered was the use of student fees for the funding of

contraceptive devices and drugs on campus. *See, e.g., Bond v. Virginia Polytechnic Inst. & State University*, 381 F.Supp. 1023 (1974); *Associated Students for the Univ. of California at Riverside v. AG of the United States*, 368 F.Supp. 11 (N.D. Ca. 1973). Although the case did not directly involve the payment of student fees to a student organization, this Court discussed the distinction between providing a forum for student organizations and affirmatively subsidizing their activities, recognizing that refusal to subsidize an organization's speech may substantially limit its ability to participate in the forum. *Healy v. James*, 408 U.S. 169 (1972).

The remainder of the decade saw the rise of litigation over the expenditure of student fees for the support of various groups whose express purpose was ideological and political advocacy. *See, e.g., Curran v. Benezet*, 360 N.Y.S. 2d 582 (1974); *Uzzell v. Friday*, 401 F.Supp. 775 (M.D.N.C. 1975) (payment of student fees in support of Black Student Movement, a student group whose purpose was the promotion of separate racial and cultural identity for black students).

Since the 1970s, the controversy surrounding student fee cases has not diminished, as evidenced by the ever-increasing amount of litigation. In contrast to the early cases in which student fees were used to fund building projects, student unions, and athletic associations, the vast majority of recent student fee cases have been centered on the expenditure of the funds for religious, political, or ideological purposes. While this survey of the history of student fees in the court system does not provide a comprehensive study of the history of student fees in America, it may be relied upon as evidence of the original

purposes for which student fees were collected, and the present-day trend toward support of political and ideological advocacy which began during the late 1960s and extended through the 1970s.

II. REGARDLESS OF THE FACT THAT IDEOLOGICAL USE OF STUDENT FEES IS A RECENT PHENOMENON, COMPELLED IDEOLOGICAL ASSOCIATION IS UNCONSTITUTIONAL.

The vintage of the compelled associational policies at issue here are irrelevant for constitutional purposes. This case turns on the issue of whether the State, under the guise of compelled student fees, can force someone to help propagate ideas to which he is diametrically opposed. Compelling a man to disseminate beliefs contrary to his own, fundamentally violates of virtually every right in the First Amendment to the U.S. Constitution.

As this Court said in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943):

> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

This standard was reiterated in *Wooley v. Maynard*, 430 U.S. 705 (1977): "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." 430 U.S. at 714 (citations and quotation marks omitted). Thus, compelling someone to adhere to another's moral judgment on one of the most controversial issues of the day is unconstitutional.

This Court has repeatedly ruled that the government may not constitutionally force people to state messages with which they disagree. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state law requiring newspapers to print response by political candidates unconstitutional); *Wooley v. Maynard*, 430 U.S. 705 (1977) (Jehovah's Witnesses cannot be forced to have state motto on their auto licenses, when the drivers disagree with the state motto); *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1974) (teacher in agency shop cannot by compelled to contribute to union activities that disseminate points of view the teacher finds offensive); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (Jehovah's Witnesses cannot be punished for refusing to say the Pledge of Allegiance in public school); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (member of a mandatory state bar cannot be compelled to pay for bar association advocacy with which the individual member disagrees).

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524 (1985), this Court enunciated

the simple principle that coerced adherence to ideology is unconstitutional: "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspects." 471 U.S. at 559.

Arguments are raised in this case that the university acting as a neutral conduit for student fees distribution diffuses arguments about compelled association. This Court in *Pacific Gas and Electric v. California Public Utilities Commission of California*, 475 U.S. 1 (1986), however, said that the relevant question was not *how* the compelled association occurred, but *whether* it had occurred:

> The constitutional difficulty with the right-of-reply statute [in Tornillo] was that it required the newspaper to disseminate a message with which the newspaper disagreed. The difficulty did not depend on whether the particular paper on which the replies were printed belonged to the newspaper or to the candidate.

475 U.S. at 18. Therefore, the fact that the University of Wisconsin is willing to dole out student fees to a variety of groups does not remove the students from the process. It is still the students who must pay for activities and the dissemination of messages with which they do not agree.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court stated that a separate and distinct constitutional right to freedom of association exists emanating from the First Amendment to the U.S. Constitution. Likewise, in *Shelton*

v. Tucker, 364 U.S. 479 (1960), this Court said that the right of free association is "closely allied with freedom of speech and is a right which, like free speech, lays at the foundation of a free society." *Id.* at 486.

This fundamental right is not susceptible to indirect governmental infringement through a university's purported interest in propagating a marketplace of ideas. As this Court stated in *Bates v. Little Rock*, 361 U.S. 516 (1959):

> [I]t is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States. *Freedoms such as these are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference.*

Id. at 523 (emphasis added).

Freedom of association includes the right not to be forced either directly or indirectly (as here) by the state to associate with ideas or beliefs that are contrary to one's own. Thus, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the state could not force an individual to associate himself with a motto which he opposed by carrying that motto on his automobile.

In *Wooley*, a follower of the Jehovah's Witness faith objected to the New Hampshire State motto, "Live Free or Die," which was embossed on his license plates in accordance with state law. Because he found the motto abhorrent to his religious beliefs, George Maynard obscured the message on the license plate. Maynard was

subsequently prosecuted, fined and given a six month suspended sentence for purposefully obscuring the state motto. *Wooley*, 430 U.S. at 710. This Court upheld Maynard's challenge to the motto requirement in *Wooley*, reaffirming the fundamental constitutional opposition to governmentally-coerced speech from individuals:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . *A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts*. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

430 U.S. at 714 (citations omitted). Accordingly, the freedom to expend money for ideological causes and the freedom to decline to expend money for other ideological causes are two sides of the same constitutional coin.

Similarly, in *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), this Court held that it is unconstitutional for people to be compelled to contribute union dues towards political and ideological causes in which they do not believe. If it is clear that the "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment," *Abood,* 431 U.S. at 233, it is equally clear that a student's associational rights may not be predicated

upon relinquishment of those rights. As the *Abood* court unambiguously held:

> The fact that appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections. . . .

431 U.S. at 234-35 (citations omitted).

These associational principles prohibit a State from compelling any individual to affirm his belief in God, *Torasco v. Watkins*, 367 U.S. 488 (1961), or to associate with a political party, *Elrod v. Burns*, 427 U.S. 347, 363-64 (1976), as a condition for employment. Consequently, the First Amendment precludes the state from forcing a student to associate with groups and messages which offend his religious and moral beliefs.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
MARK NATHAN TROOBNICK
JAMES MATTHEW HENDERSON, SR.
THE AMERICAN CENTER FOR LAW AND JUSTICE
1000 Thomas Jefferson Street, NW
Washington, DC 20007
(202) 337-2273

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Respondent.

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE ON BEHALF OF RESPONDENT

John W. Whitehead
Steven H. Aden (Counsel of Record)
Jennifer R. Schans
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

August 12, 1999

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

I. Is the First Amendment offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech?

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE ON BEHALF OF RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dep't of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Ass'n*, 119 S.Ct. 2118 (1999); *Slack v. McDaniel*, Sup.Ct. No. 98-6322 (October Term 1998) and *State of Wyoming v. Houghton*, 119 S. Ct. 1297 (1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The Institute has published educational materials and taught continuing legal education seminars in this area as well.[2]

[1] The parties have consented to the filing of this brief. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Tammy L. Evans, Chicago-Kent College of Law (*J.D.* expected 2000). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

This Court has repeatedly held that an individual has a right not to be coerced to subsidize another's speech. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). While the Court has not specifically addressed compulsory speech in the context of mandatory student fees, it has raised the question whether student fees may be susceptible to a Free Speech Clause challenge by objecting students.[3] When confronted with an issue involving compelled speech, this Court has repeatedly referred courts to its holding in *Abood* and *Keller* for guidance. In addition, this Court has provided guidelines for determining whether compelled subsidization of speech is constitutionally permissible by articulating a three-part test. *Lehnert v. Ferris Faculty Ass'n, et al.*, 500 U.S. 507 (1990). For compelled subsidization to be permissible, the government must establish the following: (1) the mandatory

[2] John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

[3] *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 851 (1995) (O'Connor, J., concurring).

fee is germane to some otherwise legitimate government scheme; (2) the mandatory fee furthers a vital policy interest of the government; and (3) the forced funding does not significantly add to the burdening of free speech inherent in achieving those interests. *Id.* at 519.

The Court is now called upon to decide whether the mandatory student fee imposed by the University of Wisconsin-Madison violates the First Amendment freedom of speech rights of students who oppose the political and ideological views funded by their fees. *Amicus curiae* The Rutherford Institute respectfully suggests the mandatory student fee does unlawfully compel students to subsidize speech with which they disagree. The mandatory fee is not germane to some otherwise legitimate governmental scheme and does not further the University's asserted interest in the education of its students. Furthermore, the mandatory fee significantly burdens the students' First Amendment freedom of speech rights, insofar as they are not allowed to graduate and do not receive their diplomas if the mandatory student fee is not paid each semester.

III. ARGUMENT

While the Constitution does not prohibit a compulsory organization such as a union from spending funds for the expression of political views or other ideological causes not germane to its purposes, the Constitution does require that such expenditures be "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Abood*, 431 U.S. at 235-36; *Keller*, 496 U.S. 1. Because the compulsory student organization in the instant case is indistinguishable in form and

function from the compulsory union and bar association reviewed in *Abood* and *Keller*, the standards set forth in those cases govern here.[4] In an *Abood/Keller* compelled organization scheme, federal and state appellate courts have almost unanimously applied the three-part *Lehnert* test to determine whether the mandatory student fee is permissible.[5] Compelled funding of speech is permissible under *Lehnert* if the University establishes the following elements: (1) the mandatory fee is germane to some otherwise legitimate government scheme; (2)

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[4] In *Keller*, *supra*, the Court unanimously applied the standards set out in *Abood* to a state bar association on the basis of a rather utilitarian analysis that a bar association was more like a union than a government agency because its principle funding came not from appropriations made to it by the legislature, but from dues levied on its members, and because it represented a discrete group of individuals for a common benefit of members. *Keller*, 496 U.S. at 11. For the same reasons the Associated Students of Madison (hereinafter "ASM") is clearly not an arm of the State of Wisconsin, but a compulsory membership organization.

[5] *See Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 503, *cert. denied*, 510 U.S. 863 (1993) ("The Constitutional guarantees of free speech and association do not permit the state to make speech a matter of compulsion and coercion. As the present system of funding student activities has that effect, it cannot be continued without affording dissenting students an appropriate remedy."); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993) ("We find the University's educational goals sufficiently weighty to justify the University's subsidy of a student-run newspaper."); *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) ("The minimal and indirect restriction on Kania's constitutional rights worked by the University's funding of *The Daily Tar Heel* does not violate the fourteenth amendment."); *Good v. Associated Students of Univ. of Wash.*, 542 P.2d 762, 769 (1975) ("If such views are expressed only as a part of the exchange of ideas and there is no limitation or control imposed so that only one point of view is expressed through the program, there is no violation of the constitutional rights of the plaintiff."); *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985), *cert. denied* 475 U.S. 1065 (1986) (applying similar analysis to hold compelled student subsidy unconstitutional under *Abood*.)

the mandatory fee furthers a vital policy interest of the government; and (3) the forced funding does not significantly add to the burdening of free speech inherent in achieving those interests. *Lehnert*, 500 U.S. at 519. For the reasons discussed below, the Petitioner's compelled funding scheme fails all three prongs for the *Lehnert* test.

A. THE MANDATORY FEE IS NOT GERMANE TO AN OTHERWISE LEGITIMATE GOVERNMENT INTEREST

The Supreme Court first addressed compelled speech in *Abood*, in which it examined a mandatory service fee imposed by a union on non-union teachers. *Abood*, 431 U.S. 209. The Court held that unions could not expend dissenting individuals' dues for political or ideological activities that were not germane to the purpose for which compelled association was justified, *i.e.*, collective bargaining activities. *Id.* at 235-36. The Court also cautioned that unions could not coerce objecting employees against their will or threaten them with loss of government employment. *Id.*

Similarly, this Court struck down the use of mandatory bar dues to fund lobbying on political and ideological issues in *Keller*, 496 U.S. at 14. In *Keller*, the State's interest in regulating the legal profession and improving the quality of legal services justified the compulsory dues requirement. *Id.* at 8-9. This Court found the compelled funding germane to the State's asserted interest because the expenditure promoted an efficient legal system in California, which benefits its citizens and attorneys. However, this Court stressed that California could not fund activities of an ideological nature which fell outside the aforestated areas of activity. *Id.* at 14.

The Respondents do not contest the legitimacy of the University's professed interest in the education of its students, but challenge the germaneness to the University's interest of compulsory funding of speech. The University described their interest as germane in the following manner:

> Because vibrant student speech is at the core of the University of Wisconsin's mission and because the provision of student services to a diverse student body is an essential University function, expressly authorized by the Wisconsin Legislature, if the germaneness test applies, the student activity fee at the University of Wisconsin-Madison should be upheld.

(Petitioner's Brief, p. 37.) The University's germaneness argument glosses over this requirement to the degree that it becomes circular in nature. The Wisconsin legislature has drawn its interest in establishing the ASM broadly, to encompass not only the admittedly legitimate purpose of providing common representation of student concerns to the administration and provision of student services, but also the expansive and virtually illimitable mission of "educating" students and the public. So defined, the compulsory fees could be spent on virtually any speech or activity simply by virtue of the legislature's prodigious declaration of purpose, a result certainly not contemplated by the Court in *Abood* and *Keller*. Nonetheless, in determining whether the challenged expenditure is germane to the expressed interest, this Court has held that germaneness cannot and should not be applied broadly. *See Abood*, 431 U.S. at 220; *Keller*, 496 U.S. at 15-16. The purposes of collecting and distributing mandatory student fees should thus be narrowly drawn in furtherance of a legitimate governmental purpose that is one carefully construed so as not to infringe on the free speech rights of student members.

The use of mandatory union dues to fund political activities was held in *Lehnert* to be too attenuated to justify the compelled support and funding of objecting employees. 500 U.S. 507. This Court stressed in *Lehnert* that unions cannot constitutionally compel their employee members to subsidize political activities outside the limited context of contract ratification. *Id.* at 522.

> Where, . . . the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, . . . *the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees*.

Id. at 520 (emphasis supplied). The Court applied a narrow reading of germaneness, holding that the challenged political activities related to the financial support of its employees and not contract ratification. *Id.* Likewise here, the University's use of mandatory fees to fund political and ideological activities does not justify the compelled funding and support of objecting students. Affording close scrutiny of the germaneness requirement pursuant to *Lehnert* clearly demonstrates that the challenged funding results in little or no benefit to the educational mission of the University. Recognizing the difference between permitting the State through its university system to exact student assessments to further extra-curricular education and permitting it to make exactions for funding issue politics poses no more of a constitutional hurdle than that precise same type of distinction did in *Abood* and *Keller*.

In asserting the germaneness of its mandatory student fee scheme, the University relies on the Second Circuit Court of

Appeals' holding in *Carroll v. Blinken*, 42 F.3d 122 (2nd Cir. 1994), *aff'd and remanded by* 105 F.3d 79 (2nd Cir. 1997). In *Carroll*, the Court held that a state university could constitutionally compel its students to subsidize a private political organization. *Id.* at 124. However, *Carroll* actually cuts against, not in favor of, Petitioner's argument for a very important reason. The state university in *Carroll* required those organizations awarded portions of the mandatory student fees to match the amounts received and to donate those amounts back to the university for the benefit of the students.[6] The absence of such a reimbursement mechanism in the present case should likewise be held fatal to the Petitioner's scheme.[7]

Like the activities held insufficiently germane to admittedly legitimate governmental interests in collective bargaining and integrated bar associations in *Abood* and *Keller*, the University cannot expend objecting students' fees to fund private political and ideological activities because those activities are not nearly germane enough to the University's

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[6] *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) also involved a mandatory student fee imposed by a state university, portions of which were awarded to several organizations, including organizations whose primary purpose was to further particular political and ideological views. Unlike the scheme in *Carroll*, however, the University did not require reimbursements from funded groups. The Court in *Galda* concluded that while the private political organizations offered some educational benefits to the students, the benefits were incidental to the organizations' primary political and ideological purposes. *Id.* at 1065. Therefore, the Court held that the incidental educational benefits did not justify the infringement of the objecting students' speech and association rights. *Id.*

[7] *See, however, Ellis v. Brotherhood of Railway, Airline, & Steamship Clerks*, 466 U.S. 435 (1984) holding that a union rebate scheme for reimbursing objecting employees *ex post facto* for costs unrelated to the performance of union duties did not pass constitutional muster.

asserted interest in the education of its students to justify the mandatory student fee imposed on the basis of that interest. The education of students does not warrant compelling them to fund political and ideological speech. This Court should hold that the University's mandatory student fee system and the punitive mechanisms it has in place to enforce it are not sufficiently germane to its asserted interest in education to pass constitutional muster.

B. WISCONSIN'S COMPELLED STUDENT FUNDING OF POLITICAL SPEECH IS NOT JUSTIFIED BY A "VITAL POLICY INTEREST" OF THE UNIVERSITY

It has been well recognized by this Court that a university is a classic public forum which operates as a "market place of ideas." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985). *See also Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Abrams v. United States*, 250 U.S. 616 (1919); *United States v. Associated Press*, 52 F. Supp. 362 (1943), *aff'd*, 326 U.S. 1, *rehearing denied*, 326 U.S. 802 (1945); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); and *Whitney v. California*, 274 U.S. 357 (1927). The central flaw in the Petitioner's argument, as the Court's *amicus* sees it, is that the University would have the Court believe that it is a *vital* government interest to construct a non-spatial forum for the dissemination of ideas over an existing classic public forum - the university campus. It is undoubtedly within a university's discretion to do so, but that does not make it a vital public interest. Petitioner's view is akin to asserting that the government has a compelling state interest in subsidizing

placards and amplification systems for use by citizens who wish to demonstrate in public parks or on sidewalks. As the Court in *Lehnert* noted, "the burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context." *Lehnert*, 500 U.S. at 522. The Court recognized that forced subsidization for public discourse is constitutionally inappropriate:

> Labor peace is not especially served by allowing such charges because . . . our national and state legislatures, the media, and the platform of public discourse are public fora open to all. Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace. Because worker and union cannot be said to speak with one voice, it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities as well as their own.

Id. at 521.

The Court has taken note of particular circumstances in which a vital public policy interest is served by the governmental allocation of limited financial or other resources to competing ends. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (First Amendment does not preclude imposition of equal time doctrine on private broadcasters who are licensed by the Government to use scarce resources which are denied to others); *Arkansas Educational Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (Arkansas public television broadcaster's decision to exclude independent congressional candidate from televised debate held to be reasonable exercise of journalistic discretion consistent with the First Amendment.); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168

(1998) ("Decency" guidelines for National Endowment for the Arts do not, on their face, impermissibly infringe on First or Fifth Amendment rights.). However, the present case involves no such circumstances, since the University of Wisconsin's mandatory student fee system is funded solely by students and the University cannot establish a need to become involved in the distribution of the mandatory student fee.

In *Red Lion*, this Court addressed two issues: (1) whether the radio station failed to meet its obligation under the fairness doctrine when it refused to provide reply time to an individual personally attacked during a broadcast, and (2) whether the regulations enacted in response to the station's refusal to provide reply time violated the broadcaster's First Amendment freedoms. *Red Lion*, 395 U.S. at 370-71. The Court weighed the Government's authority to limit the use of broadcast equipment because of the limited number of bandwidth frequencies available, and its important policy interest in avoiding the chaos that would likely ensue if anyone were permitted to use any frequency at whatever level he or she desired.

> It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

Id. at 389. *See also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Recognizing that the power given to the Federal Communication Commission to assure that its broadcasters operate in the public interest is expansive, this Court found the

regulations to be within the authority of the FCC. *Id.* at 385.

The University claims that its interest in providing a neutral and diverse educational atmosphere to encourage various views is sufficiently strong to mandate subsidized funding. However, contrary to the Government's interest in *Red Lion*, the objecting students' interest in free speech is actually inhibited, not empowered, by the University's mandatory student fee system. Nor does Petitioner's compelled funding scheme resemble the system of government administered artistic funding grants upheld in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168.[8] The Court in *Finley* did not perceive any realistic danger that the criteria would be utilized to preclude or punish the expression of particular views, thereby compromising First Amendment values. The Court also acknowledged the National Endowment for the Arts' (hereinafter "NEA") limited resources to allocate among numerous "artistically excellent" projects, and that the NEA must allocate the grants on the basis of a wide variety of subjective criteria. *Id.* at 2177-78. As a result, this Court found that the NEA must deny a majority of the grant applications that it receives including various "artistically excellent" projects. *Id.* The artists still had ample means to express their artistic talent despite being refused federal funding. *Id.* At 2178. Therefore, this Court held that the challengers of the provision failed to demonstrate a substantial risk that the application of the

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[8] The Congressional amendment at issue, section 954(d)(1), established procedures instructing those judging artistic merit of grant applications to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2173 (1998). After the NEA denied the grant applications of four artists, those artists filed suit, challenging the constitutionality of section 954(d)(1).

provision would lead to the suppression of speech, a factor necessary for the Court to invalidate the provision. *Id.* at 2179.

Like the federal subsidy at issue in *Finley,* the University's mandatory student fee is a subsidy scheme created to encourage the expression of a diversity of views from private speakers. However, unlike the NEA funding scheme, the University's mandatory student fee is derived solely from the students' compelled association, and not from the State's general revenues. Further, *Finley* held that although the First Amendment certainly has application in the subsidy context, the government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake, and that as long as the legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. 118 S. Ct. at 2179. Here, the University is not allocating competitive funding on a merit basis; rather it is extracting association dues from objecting students to fund a limited non-spatial forum of expression on a content and viewpoint-neutral basis. Therefore, the University does not and should not enjoy wide latitude in such funding practices.

As aforementioned, the students do not contest that the University has an important policy interest in the education of its students. Nonetheless, to survive strict scrutiny under the *Lehnert* test, the University must justify its compelled funding of the private political and ideological organizations as furthering its "vital interests." *Southworth v. Grebe,* 151 F.3d 717, 727 (7th Cir. 1998), *rehearing en banc denied,* 157 F.3d 1124 (7th Cir. 1998), *cert. granted,* 119 S. Ct. 1332 (1999). To determine whether the challenged expenditure is justified, this Court must first ascertain the vital policy interest involved and then decide whether the interest is appropriately served by

the challenged expenditure. *Lehnert,* 500 U.S. at 521. The University must identify a common cause between those compelled to subsidize speech and the vital policy interests that justify subsidization. 151 F.3d at 727. As the court below phrased it in *Lehnert,* this Court determined that the vital policy interest of the union was labor peace, but the relationship between the union lobbying activities and the employees' contracts was remote:

> Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.

Id. Finding no common cause between the employees compelled to subsidize the union's activities and the union's vital policy, the court below properly struck down the compelled expenditure. 151 F.3d at 728.

Lehnert instructs that the University's mandatory student fee will be deemed justifiable only if the University's interest in education is served by compelling objecting students to fund political and ideological speech. However, compelling objecting students to fund political and ideological activities does not promote the educational mission of the University. As in *Lehnert,* the relationship between the University's interest in education and the compelled funding of political and ideological speech is too remote and attenuated to be justified, since no common cause exists between the objecting students who are compelled to fund said

activities and the students who propagate such speech by virtue of the University's mandatory student fee.

The mandatory student fee does not promote the University's interest in education, but forestalls the students' ability to express political and ideological views of their own choosing. Instead, many organizations that receive portions of the student fee directly fund political lobbying to further the organization's ideological beliefs. Therefore, having failed to meet the second prong of the *Lehnert* test, the University's mandatory student fee should be held unconstitutional.

C. THE MANDATORY STUDENT FEE SIGNIFICANTLY ADDS TO THE BURDENING OF THE STUDENTS' FREEDOM OF SPEECH IN ACHIEVING THE UNIVERSITY'S ASSERTED INTEREST

To satisfy the third prong of the *Lehnert* test, the compelled expenditure must not significantly add to the burdening of free speech inherent in achieving its asserted interest. *Lehnert*, 500 U.S. at 519. The mandatory student fee is unconstitutional because the University significantly adds to the burdening of its students' freedom of speech rights by forcing students to fund views they may not espouse. Students who object to the compelled funding and refuse to pay the mandatory student fee receive an academic "death penalty;" they cannot graduate and cannot receive their degrees. Clearly, to paraphrase the Court, "allowing the use of dissenters' assessments for political activities...would present 'additional interference with the First Amendment interests of objecting [students].'" *Id.* at 521 (quoting *Ellis, supra*, 466 U.S. at 456).

As a plurality of the Court said in *Lee v. Weisman*, 505 U.S. 577, 596 (1992), "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Amicus* submits the same is true of coerced funding of ideological and political speech. This Court based its decision in *Abood* in large part on this concern, recognizing that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35.

The third prong of the *Lehnert* test recognizes the burden on free speech and association that results when the government forces individuals to fund private political and ideological organizations. *See Southworth*, 151 F.3d at 727. The Court determined that the use of dissenting employees' dues to fund and promote political lobbying was unconstitutional because it significantly burdened the dissenting employees' free speech and free expression. *Lehnert*, 500 at 521-22. Furthermore, this Court recognized that the burden upon freedom of speech rights is greatest when the compelled speech is in a public context. *Id.* The First Amendment protects the individual's right of participation in the public sphere from government invasion. *Wooley v. Maynard*, 430 U.S. 705 (1977). In holding that the state of New Hampshire may not constitutionally compel a citizen to display the state motto on vehicle license plates, "Live Free or Die," where the motto was repugnant to their personal beliefs, this Court noted that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of an individual's freedom

of mind." *Id.* at 715. *See also Shelton v. Tucker,* 364 U.S. 479, 487 (1960); *Lehnert,* 500 U.S. 507.

Distinguishable from the present case is this Court's holding in a recent compelled funding case, *Glickman v. Wileman Bros. & Elliott,* 521 U.S. 457 (1997). *Glickman* involved monetary exactions imposed on several growers, handlers and processors of California tree fruits, which the State used for advertising of California fruit, and administrative costs associated with the advertisements.[9] Relying on its prior holdings in both *Abood* and *Keller*, this Court upheld the regulations, finding that the regulations neither imposed a restraint on the freedom of any producer to communicate any message to consumers, nor compelled any person to engage in actual or symbolic speech. *Id.* at 465.

Contrary to this Court's analysis in *Glickman*, the present case involves an imposed restraint on the freedom of the students to communicate messages to the public. The University compels objecting students to fund speech that they do not personally support. In *Glickman,* the regulations imposed by the State promoted the common interests of the growers, handlers and processors, and those individuals were not prohibited in communicating any messages to the public. Unlike the growers in *Glickman* who were forced to pay monetary exactions to the State, the objecting students receive no substantive benefits from the mandatory student fee, and the speech subsidized thereby cannot reasonably be said to

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[9] The Court analyzed this case as a compelled funding situation rather than in a commercial speech context, finding the application of commercial speech analysis inconsistent in determining the constitutionality of the collective action program at issue here. *Glickman,* 521 U.S. at 474.

further interests common to most students. By arguing before the Court that the University has an overriding interest in forcing all students, including objectors, to subsidize speech they may find disagreeable as a necessary aspect of their "education," Petitioner turns on its head the Court's constitutional philosophy in this area. As the Court observed in *Lehnert:*

> [L]obbying and electoral speech are likely to concern topics about which individuals hold strong personal views. Although First Amendment protection is in no way limited to controversial topics or emotionally charged issues, the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect.

500 U.S. at 521-22. In essence, Petitioner contends that the State's interest in forcing a student to pay for speech he disagrees with simply on the basis of its belief that he needs to be educated with a "diversity of opinions," overrides the student's right to be free from forced subsidization. Petitioner is asking the Court to rule that the State's "right" to educate students at their own expense trumps their First Amendment free speech rights. *Abood* and *Keller* stand firm against the state-sponsored extraction of money to disseminate views that are contrary to a citizen's conscience; Petitioner's attempt to justify Wisconsin's extraction as "educational" is likewise constitutionally untenable.

The dissent in the Seventh Circuit Court of Appeals' denial for rehearing *en banc* correctly established that when a forum of funding is created, the disbursement of the funds must be determined in a content-neutral manner. *Southworth*

v. Grebe, 157 F.3d 1124, 1125 (rehearing *en banc* denied) (7th Cir. 1998) (Rovner, dissenting). However, the dissents' argument that the mandatory student fee is permissible because the funds are distributed in a viewpoint and content neutral manner is flawed. The neutral distribution of funds does not lessen or discharge the University's violation of its students' freedom of speech rights engendered by its refusal to permit objectors to opt out. Allowing the University to trample on its students' First Amendment rights, as long as it does so in a viewpoint neutral manner, completely undermines the First Amendment. *See Palko v. Connecticut*, 302 U.S. 319, 327 (1937) ("freedom of thought and speech is the matrix, the indispensable condition, of nearly every other form of freedom."); *see also Wooley*, 430 U.S. 705; *Lehnert*, 500 U.S. 507; *Galda*, 772 F.2d 1060; and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238.

IV. CONCLUSION

The University of Wisconsin's mandatory student fee is an unconstitutional restraint on the students' First Amendment freedom of speech rights. The mandatory student fee is not germane to the University's asserted interest in the education of its students because the benefits derived from compelled funding are only incidental. Furthermore, compelling objecting students to fund organizations whose political and ideological views they do not espouse inhibits rather than furthers the University's interest in its students' education. Finally, the mandatory student fee significantly adds to the burdening of the objecting students' freedom of speech by compelling those students to fund speech, denying them the right of refusal. Having established that the University's mandatory student fee system fails all three prongs of the *Lehnert* test, this Court

should find that the mandatory student fee system is an unconstitutional violation of the students' First Amendment freedom of speech rights.

Respectfully submitted,

John W. Whitehead
Steven H. Aden (Counsel of Record)
Jennifer R. Schans
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

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IN THE

Supreme Court of the United States

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, ET AL.,
Petitioners,

v.

SCOTT H. SOUTHWORTH, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Mathew D. Staver
LIBERTY COUNSEL
1900 Summit Tower Blvd.
Suite 540
Orlando, Florida 32810
(407) 875-2100

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INTEREST OF *AMICUS CURIAE*

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel's activities include educating the public regarding civil liberties and the role of law in the judicial process in preserving and implementing individual freedoms and the democratic process. As part of advancing its purpose, Liberty Counsel coordinates with local attorneys and members of the academic community to provide educational resources and opportunities to both the lay and legal communities, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Liberty Counsel is particularly interested in protecting the First Amendment rights of freedom of speech/expression and religious liberty. Liberty Counsel is also interested in insuring that governmental entities such as state universities adequately fulfill their statutory mandate and vital social role, including maintaining the cohesiveness of a vibrant student body, while minimizing any infringement upon students' First Amendment liberties.

Liberty Counsel files this Brief in support of the Respondents in order to assist this Court in rendering a reasoned decision concerning the First Amendment impact of

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief the only exception being the letter of consent of the Petitioner which is on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

mandatory student fees and the constitutional analysis in such a context. Attorney Mathew D. Staver has previously appeared before this Court and through this Brief attempts to lend his assistance in the proper evaluation of the constitutional infringement and application of the constitutional analysis.

SUMMARY OF ARGUMENT

By withholding students' grades and diplomas to compel payment of student activities fees and student referendum assessments, the Board of Regents of the University of Wisconsin (hereinafter "the Board" or "University") violates objecting students' First Amendment rights of freedom of conscience and freedom from compelled speech and compelled association.

The underlying principle of the First Amendment is the protection of the "sphere of intellect and spirit from all official control." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). This Court has consistently held that freedom of conscience is central to the First Amendment. *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (1977). Additionally, the University's exaction of fees constitutes compelled speech. This is because government regulation of funding for political expression constitutes regulation of expression itself. *Buckley v. Valeo*, 424 U.S. 1 (1976) Money is the equivalent of speech, because "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19. The University's compelled funding scheme also implicates First Amendment rights of association. Making a contribution serves to affiliate a person with a candidate, party or cause, even if the identity of the contributor is not publicly disclosed. *Buckley*, 424 U.S. at 22. As with compelled speech,

"governmental action that may have the affect of curtailing freedom to associate is subject to the closest scrutiny," *Buckley*, 424 U.S. at 25.

The "germaneness analysis" is inapplicable in the present context. Under the germaneness analysis, individuals may be required to endure some infringement of First Amendment liberties when the organization involved acts for the common cause of the membership and within its unique, governmentally-endorsed role serving the greater good of society. Thus, the "germaneness" test has been applied to unions, bar associations and agricultural cooperative advertising programs which have relatively narrow and unique missions in the representation of their membership and the preservation of social order. These policy considerations are absent when applied to the University of Wisconsin.

If the "germaneness" test is actually applied to the University, then the University's purpose under that analysis must be defined in terms of the its unique academic role. Funding of Registered Student Organizations is not germane to that purpose, since participation in any independent student activities is purely voluntary and there is generally no academic credit or grade.

The "germaneness" test is more appropriately applied to the Associated Students of Madison ("ASM"), which is the official entity representing the student body. The funding of independent Registered Student Organizations is not germane to those representative functions.

ARGUMENT

I.

COMPELLING THE PAYMENT OF STUDENT FEES WHICH ARE USED TO SUPPORT OBJECTIONABLE POLITICAL AND IDEOLOGICAL ACTIVITIES OF INDEPENDENT STUDENT ORGANIZATIONS VIOLATES THE FIRST AMENDMENT PROTECTIONS OF FREEDOM OF CONSCIENCE AND FREEDOM FROM COMPELLED SPEECH AND COMPELLED ASSOCIATION, THEREBY TRIGGERING THE HIGHEST LEVEL OF CONSTITUTIONAL SCRUTINY.

The University of Wisconsin's scheme of mandatory student fees violates the First Amendment. Strict scrutiny must be applied. Forced dues also violate freedom of conscience and freedom from both direct and indirect compulsion of speech and association. Strict scrutiny is triggered because the University imposes an unconstitutional condition upon the receipt of a state university diploma.

A.

The Violation Of Freedom Of Conscience Created By Mandatory Financial Support Of Objectionable Political And Ideological Activities Requires Strict Scrutiny.

The University withholds grades and diplomas in order to compel every student to pay a fixed student activities fee.

An allocable portion of this fee is then distributed, through the Associated Students of Madison, with Board approval, to independent Registered Student Organizations, including numerous organizations whose primary purpose is political and ideological activism. The compulsory extraction of fees to support objectionable, political and ideological expression is a violation of several First Amendment liberties, most importantly the freedom of conscience.

The First Amendment protects "freedom of thought", "freedom of mind" and a "sphere of intellect and spirit". *Wooley v. Maynard*, 430 U.S. 705, 706 (1977). This freedom of conscience and intellectual autonomy is the centermost pillar of the First Amendment. "At the heart of the First Amendment is the notion that an individual should be free to believe as he will, that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." *Glickman*, 521 U.S. 457, 472 (1997)(quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (1977)). "If there is any fixed star in our constitutional conste"ation, it is that no official, high or petty, can prescribe what is orthodox in politics, nationalism, religion or other matters of *opinion*." *West Virginia Board of Education v. Barnette*, 419 U.S. 624, 642 (1943).

The healthy function of a democratic society is inextricably linked to the right to think, believe and act independent of any government intrusion. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976). The concept of free trade in the marketplace of ideas is even more central to an open society than free markets in tangible commodities. "The best test of truth is power of the thought to *get itself* accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919)(emphasis added). The concept of government intrusion to alter or even enhance the content of

public debate "is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. at 48-49. "Our political system and cultural life rest upon ...the principle that each person should decide *for himself or herself* the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)(emphasis added).

At the zenith of the First Amendment's protection of intellectual autonomy is the protection afforded to political and ideological belief and expression. This is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Known as "core political speech," political and ideological expression has consistently received the highest protection from this Court.

This Court has also noted that there is no substantial distinction between political speech and the funding of such speech. *Buckley*, 424 U.S. 1; *See also Glickman*, 521 U.S. at 458 (distinguishing a regulation of commercial speech "from laws we have found to abridge the freedom of speech" in part because the "[marketing orders] do not compel the producers to endorse *or to finance* any political or ideological views.")(emphasis added).

In *Abood*, this Court held that compelling contributions for political expression implicates First Amendment interests specifically because it "interfere[s] with the freedom of conscience which lies at the heart of the First Amendment." *Abood*, 431 U.S. at 234. Just as "each person [is free to] decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence," *Turner Broadcasting*, 512 U.S. at 622, each individual must also be free to decide for himself which ideas are deserving of

financial support.

In the present case, the University, through the Associated Students of Madison, funds political and ideological speech which is repugnant to many students. The University deprives the individual students of the freedom to decide for themselves "the ideas and beliefs deserving of expression, consideration" and financial support. *Turner*, 512 U.S. at 641. The University has therefore intruded into the students' intellectual autonomy, creating for many a "crisis of conscience" by compelling the financial support of repugnant speech. As this Court has often noted, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234-235, n.31 (quoting Irving Brandt, *James Madison: The Nationalist*, p. 354 (1948)).

B.

Compulsory Financial Support Of Objectionable Political And Ideological Activities Constitutes Compelled Speech And Compelled Association, Which Merits Strict Scrutiny.

The University's mandatory student activities fee also triggers strict scrutiny because it acts as a direct compulsion of core political speech. Several lower courts have suggested that funding of speech does not raise constitutional concerns because it does not require the contributor to engage in any personal speech. *See, e.g., Rounds v. Oregon State Board of Higher Education*, 166 F.3d.1032 (9th Cir. 1999); *Good v. Associated Students of the University of Washington*, 542 P.2d 762 (1975). Yet this Court has regularly equated compelled funding with compelled speech, echoing James Madison's

protest:

> Who does not see...that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Abood, 431 U.S. at 234-235 n.31 (quoting 2 *The Writings of James Madison*, 186 (Hunt Ed., 1901))

In at least two lines of cases, this Court has recognized that contribution of funds for political and ideological activities is direct expressive conduct which merits First Amendment protection. In F.E.C.A. cases, this Court has recognized that government regulations of political contributions and expenditures "operate in an area of the most fundamental First Amendment activities," and that such regulations impose direct and substantial, rather than merely theoretical, restraints on the quantity and diversity of political speech. *Buckley*, 424 U.S. at 14, 19. In *Railway Employees V. Hanson*, 351 U.S. 225 (1956); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood*, 431 U.S. at 209, and succeeding cases, this Court has recognized that "just as the First Amendment prohibits compelled speech, it prohibits -- at least without sufficient justification by the government -- compelling an individual to render financial support for others' speech." *Glickman*, 521 U.S. at 457. In *Machinists v. Street*, this Court recognized that use of mandatory fees "to promote the propagation of [objectionable] political and economic doctrines, concepts and ideologies 'raises constitutional questions of the utmost gravity.'" 367 U.S. at 744, 749. In *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991), this Court rejected Justice Marshall's

argument that merely funding union activities did not constitute a "conscription of expressive capacities." 500 U.S. at 541 (Marshall, J., dissenting). Rather, this Court held that:

> By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds acceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion.

Lehnert, 500 U.S. at 523 (citation omitted).

The above observation applies to this context with equal weight. By requiring the payment of funds which it permits to be used in part "for political lobbying and to garner the support of the public" for objectionable policies and programs advocated by various Registered Student Organizations, the Board intrudes upon "the individual's right of participation in these spheres" and effectively compels the support of public debate when the student would prefer to remain silent.

Clearly, confiscation of money for support of political and ideological debate constitutes compelled speech. It is precisely this label which has been applied to the line of cases descending from *Railway Employees*, 351 U.S. at 225 and *Street*, 367 U.S. at 740, through *Abood*, 431 U.S. at 209, *Lehnert*, 500 U.S. at 507 and *Keller*, 469 U.S. at 1 (1990) and extending to *Glickman*, 521 U.S. at 457. These cases all involve financial support for speech rather than direct personal speech, and yet are properly described as "compelled speech"

cases. The funds which are generated are not analogous to a "metaphysical forum" which Justice Kennedy described in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), but rather the monetary equivalent of actual speech. Money merely serves as a transferable resource or a means of exchange. In this context, as in *Buckley*, money is converted into speech and must be treated as such.

Strict scrutiny has generally applied to government action which compels speech. The sole exception involving representative entities legislatively created to serve vital government interests is inapplicable in this case.

The University's mandatory student activities fee also implicates the First Amendment freedom of association. A financial contribution to a candidate or ideological group serves to affiliate the contributor with that candidate or ideology. *Buckley*, 424 U.S. at 22. In addition to actively contributing to the propagation of the donee's speech, a contribution is a symbolic declaration of alliance with the donee and its other supporters. Moreover, a contribution's symbolism of affiliation is not reduced by its anonymity, since the First Amendment similarly protects against involuntary disclosure. *Buckley*, 424 U.S. at 64. A contributor's declaration of allegiance by his financial support is therefore a meaningful and protected expression, even if it is known only to the contributor.

The University's allocation of mandatory student fees to support political and ideological speech, without allowance for students' objections, constitutes an impermissible compulsion of a symbolic declaration of allegiance to repugnant beliefs. Strict scrutiny must apply because in this context there is no competing legislative policy to serve a

broader social good through a representative entity.

Strict scrutiny also applies where the indirect effect of a government regulation burdens First Amendment liberties. *Buckley*, 424 U.S. at 64. Thus, strict scrutiny must apply in this case because the University's mandatory student activities fee indirectly compels actual speech. Compulsory dues violates the freedom of silence which is the necessary corollary of freedom of speech.

The freedom to choose when to speak and what to say necessarily includes the freedom to choose when *not* to speak and what *not* to say. *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). The University's use of allocable fees to fund political and ideological expression indirectly compels students to speak in order to counterbalance the effect of their involuntary support of others' objectionable expressions. Having paid the student activities fee, the student must either silently consent to the objectionable speech which the student is involuntarily financing, or is compelled by the resulting "crisis of conscience" to counterbalance that support with an expression of opposition, whether financially or vocally. (Indeed, this very litigation is an expression of opposition to the funded speech, although the remedy sought is not a silencing of the speech but a termination of the obligatory funding of it.) The University's funding policy is therefore constitutionally defective because it "risks forcing [students] to speak when [they] would prefer to remain silent." *Pacific Gas and Elec. Co. v. PUCC*, 475 U.S. 1, 18 (1986).

None of the characteristics of the University's funding policy justify the burden that it imposes. That the funds are distributed to a multiplicity of student groups on an allegedly content neutral basis does not diminish the First Amendment

infringements. "It simply means that students must fund more than one unwanted view." *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3rd Cir. 1985). To paraphrase Justice Kennedy in *Rosenberger*, the "declaration that debate is not skewed so long as multiple voices are [funded] is simply wrong; the debate is skewed in multiple ways." *Rosenberger*, 515 U.S. at 831-832. Funding of multiple groups simply provides no assurance that there will be representation of all opposing viewpoints within the marketplace of ideas; nor is there any assurance that opposing viewpoints will be equally funded. Indeed, the reality at the University of Wisconsin is that the debate is distorted by disproportionate funding of a narrow spectrum of viewpoints.

Similarly, a student's option to participate in a student organization or to create his own does not mitigate the constitutional infringement. Having contributed to the support of disagreeable ideologies, a student has no choice but to either implicitly consent to such activities or to actively oppose them. While the student may cancel or counterbalance unwilling support of an ideology by actively challenging it, that activity does not similarly cancel the constitutional injury. Rather, it is multiplied since the student is first compelled to sacrifice his conscience by compelled support of repugnant ideas, and then is compelled by that "crisis of conscience" to sacrifice his freedom to refrain from speaking.

Thus, the First Amendment violations inflicted by compelled funding are not minimized by either content-neutral distribution or a dissenting student's option of participating in debate. The students are still compelled against their will to fund the activities of organizations whose ideas are repugnant to them. It does not justify the burden that everyone else is similarly burdened or that all may speak and seek funding for their speech.

Additionally, the claim of content-neutral distribution in this case is illusory because the record bears out that ASM's distribution of funds does not actually occur on a content-neutral basis. The eighteen political/ideological student organizations receiving disbursements of student fees reflect a disproportionate (if not complete) concentration on the liberal and anti-establishment spectrum of political activity. There does not appear to be a single conservative or mainstream student organization which has been granted funding for its political activity.

Even those courts which have allowed mandatory student fees for funding of political speech have held that "there must be in fact a spectrum represented, not a single track philosophy." The funding scheme "cannot become the vehicle for the promotion of one particular viewpoint..." *Good v. Assoc. Students of University of Washington*, 542 P.2d 762 (Wash. 1975). This Court has expressed concern that there is a "perception of government endorsement" where a narrow selection of viewpoints "threatens to dominate the forum." *Rosenberger*, 515 U.S. at 850-851 (O'Connor, J., concurring). "In fulfilling its role, it is expected that a university will strive for balance and afford adequate opportunity for offering opposing viewpoints." *Galda*, 772 F.2d at 1067. The disproportionate funding of a narrow spectrum of viewpoints reflects "presumptively unconstitutional...attempts to suppress a particular point of view...in funding..." *Rosenberger*, 515 U.S. at 830.

Certainly there is no content-neutral justification for an assessment imposed by a student referendum, for the specific funding of a single student organization. Such an assessment is nothing short of a majoritarian confiscation of funds for the advancement of a single political view. No court has found any justification for such assessments. *See, e.g.*, *Galda*, 772

F.2d at 1060.

Content-neutral distribution is not a justification for forcible collection of funds, since the actions of distribution and collection each have distinct First Amendment implications. However, a *lack* of content-neutral distribution as reflected in this case, magnifies the compelled speech concerns pertaining to funding. While a distribution to multiple speakers does not eliminate the compelled speech effect of forcible funding, a concentration of funds in a narrow spectrum of viewpoints creates the "perception of endorsement," creating an even more acute coercion on those who object to financial support.

The University's fee policy compels the student to sacrifice either his conscience or his silence. In either instance, a violation of the First Amendment is unavoidable, as the First Amendment protects the entire "sphere of intellect and spirit" from such government intrusion.

II.

IF APPLIED, THE "GERMANENESS" ANALYSIS MUST FOCUS ON THE REPRESENTATIVE ROLE AND PURPOSE OF THE ASSOCIATED STUDENTS OF MADISON.

Reduced scrutiny does not apply in this context because there is no vital government interest in the speech activities of private student groups. However, if applied, the "germaneness analysis" should not focus on the University as a whole, but rather on the Associated Students of Madison. That organization most closely fits the representational entities to which the "germaneness analysis" has been previously

applied.

A.

The "Germaneness" Analysis Does Not Apply To The University Of Wisconsin As A Whole.

The "germaneness analysis" in *Abood*, 431 U.S. 209 (1977); *Keller*, 496 U.S. 1 (1990); and *Lehnert*, 500 U.S. 507 (1991), evolved in the context of "highly specialized vocational groups, organized around the narrow interests of a single industry or profession and designed to speak for those interests with essentially one voice." *Smith v. Regents*, 844 P.2d 500, 520 (Cal. 1993)(Arabian, J., dissenting). This Court has never previously applied the "germaneness analysis" outside of the context of such representational groups. *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984); *International Assoc. of Machinists v. Street*, 367 U.S. 740 (1961); *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991); *Airline Pilots Assoc. v. Miller*, 523 U.S. 866 (1998).

Each of these decisions involved a representative entity created by legislative enactment to serve both the "common cause" of the membership and a policy interest of greater social stability and cohesiveness. For such organizations, the fulfillment of their statutory mission requires an ability to speak with a single voice on behalf of their membership. This Court recognized the vital government interests at stake in the creation and regulation of these organizations and has declined to apply strict scrutiny to speech activities "germane" to their statutory purpose. The "germaneness analysis" has been applied to unions, professional organizations, and agricultural cooperatives.

This Court has long recognized that Congress has ordained the existence of unions in the pursuit of "industrial peace and stabilized labor management relations..." *Railway Employees Dep't. v. Hanson*, 351 U.S. at 233-234. This is because unions are "organized around the narrow interests of a single industry...and designed to speak for those interests with essentially one voice," *Smith v. Regents of the University of California*, 844 P.2d at 520. "Congress determined it would promote peaceful labor relations to permit a labor union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its costs, and that legislative judgment was surely an allowable one." *Abood*, 431 U.S. at 219.

Similarly, this Court recognized a "substantial analogy between the relationship of [a state bar association] and its members, on the one hand, and the relationship of employee unions and their members. on the other." *Keller*, 496 U.S. at 12. Further, this Court recognized that state bar associations, similar to unions, are legislatively commissioned to serve the interests of social welfare and cohesiveness, "by improving the quality of the legal service available to the people of the state," and "[aiding] in all matters pertaining to the advancement of the science of jurisprudence or the improvement of the administration of justice."[2] Because of the particular need for such representative organizations to speak with one voice in pursuit of their legislatively ordained mission, any dissent must necessarily give way to the common

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[2]It is this same representative function which permits the government itself to collect taxes and make specific and potentially controversial policy determinations. "The reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring).

cause which is the foundation and mission of that organization. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Abood*, 431 U.S. at 223 (quoting *Street*, 67 U.S. at 778 (Douglas, J., concurring).

In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), this Court held that legislative enactment of a cooperative program requiring only generic advertising for California tree fruit growers withstood a First Amendment challenge. Although that case involved only commercial speech with no ideological or political content, this Court was also guided by the observations of *Abood*, *Lehnert* and *Keller* "that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group". *Glickman*, 521 U.S. at 458.

Thus, the context of the "germaneness analysis" arises out of the conflict between the legislatively-endorsed mission of certain representative entities which necessarily requires a unified voice, and the First Amendment rights of dissenting members of those entities. *Abood*, *Keller*, and *Lehnert*, balance these competing interests by subordinating the First Amendment interests of dissenters to the legislative obligation of such representative entities to speak in a single voice on matters central to its legislative mission and in furtherance of the "common cause" of the membership.

In the present case, the University of Wisconsin has no legislative mission to act as representative of its students, nor does it seek to speak with a unified voice. Indeed, contrary to the legislative goal of uniformity which underlies unions,

professional organizations and cooperative advertising programs, the University distinctly seeks to promote diversity. Modern universities are "peculiarly the marketplace of ideas. The nation's future depends upon leaders trained through wider exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian v. Bd. of Regents of New York*, 385 U.S. 589, 603 (1967)(quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). Quite the opposite of fostering conformity, the University encourages independent thinking, dissent and challenge of that which is orthodox. *See, e.g., Smith v. Regents of the University of California,* 844 P.2d 500 (1993)(Arabian, J., dissenting)("the University's educational mission is precisely to combat orthodoxy by encouraging the dissemination of a multiplicity of views and interests, many of which will inevitably provoke controversy, debate and opposition.") The University therefore cannot claim the benefit of the "germaneness analysis," which centers upon a legislative policy decision to foster uniformity on behalf of the "common cause" of the membership and of society as a whole.

In further contrast to "compelled speech" cases employing the "germaneness analysis," a university is neither "highly specialized" nor "organized around narrow interests... Its mission is not centered on the goal of representing an industry or a profession, 'but rather on academic training in a multitude of industries and professions, and a stimulation of "intellectual growth and fulfillment [through] a wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues...'" *Smith*, 844 P.2d 500, 519 (Arabian, J., dissenting)(citation omitted). Thus the University cannot claim the narrow or "highly specialized" purpose characteristic of the representative entities found in

the compelled speech cases.

The "germaneness analysis" simply does not fit the context of this dispute. There is no legislative policy establishing a representative body for the purpose of uniformity and social stability. Absent those policy considerations, strict scrutiny must apply as in all other situations where government regulation affects core political expression.

B.

Even If The "Germaneness" Analysis Is Applied To The University Of Wisconsin, The Analysis Must Only Apply To The University's Unique Academic Purpose.

If the "germaneness analysis" can be applied at all to the University, the University cannot be attributed a purpose which is generically described as "educational." Entities which have been granted a reduced scrutiny under the "germaneness analysis" have a purpose which is highly specialized, both narrowly defined and unique in function. A purpose which is "educational" is "so broad as to encompass all of life". *Southworth v. Grebe*, 151 F.3d 717, 725 (7th Cir. 1998). There is something to be learned in every daily activity but a state university's interest in "education" does not extend to the activities of independent organizations. For the University to claim that funding independent student organizations is germane to its purpose because there are educational components to those activities is to paint with too broad a brush. While it is true that a university's communal atmosphere and extra-curricular activities provide learning opportunities through a broad range of life experiences, it does not follow that these are sufficient governmental interests to

justify constitutional infringements.

Under the "germaneness analysis," the question is whether that organization's political and ideological activities have been germane or pertinent to its unique purpose and primary goal. The unique purpose and primary goal of the university is academic instruction. All other aspects of university life are peripheral to this purpose, including any interest in political activism by private student organizations.

The primacy of the University's academic purpose is observable in various ways. Without students there would be no University and students become so only by enrollment in academic courses. A student's progression through the University is measured in terms of academic courses completed, culminating with the awarding of a diploma. The academic curriculum is the central and indispensable aspect of the University's purpose and function.

This cannot be said for extra-curricular activities, particularly activities of private student groups. While the University may encourage participation in various extra-curricular activities as part of a well-rounded university experience, participation is not mandatory. There are no grades or attendance requirements; one might attend college (and even graduate with highest honors) without ever having once participated in a Registered Student Organization. It seems beyond debate that academic success should be and is given a higher priority over participation in extra-curricular activities; indeed, threshold academic standards are often prerequisites to extra-curricular activities such as sports programs.

The peripheral nature of Registered Student Organizations is underscored by the fact that they are largely

independent of University management. While the academic program is wholly within the University's unilateral discretion and authority, the purposes and activities of independent student organizations are left largely to the students.

Finally, unlike its academic programs (and unlike unions, professional associations and cooperative programs), a university cannot claim that it is fulfilling a unique role through student organizations. The University is not the sole source for participation in music, athletics or the arts, nor is it the sole vehicle for stimulating public debate or developing community or cultural awareness. These activities are not "the cause which justified bringing the group together," *Abood,* 431 U.S. at 223, but are rather activities which naturally arise in a community which has already been brought together.

The University argues that it has an interest in training the "educated citizen". But this is an obligation and an ideal imposed upon every social institution, beginning with the family and shared by schools, churches and the host of civic and community organizations unrelated to colleges and universities.

Independent student organizations -- particularly those with political and ideological goals -- are not concerned with exploring and investigating new ideas and opinions as the University's academic program is. Rather, they are concerned with staking out certain intellectual ground and defending and advocating it to the rest of the world.

The activities of private student organizations may contribute to "learning how to live in a pluralistic society." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). It does not follow that the University has a governmental interest in

enhancing these activities sufficient to justify First Amendment intrusions. While extra-curricular activities and independent student groups create valuable opportunities for the students, they are merely valuable adjuncts to the academic purpose of college education. They are fringe benefits. While these opportunities enhance the college atmosphere and the opportunities for broader personal development, they are neither indispensable nor central to the college purpose. They are not of sufficient importance to justify constitutional violations which challenge the fundamental freedoms of our society.

For the University to claim that it is entitled to confiscate funds in order to promote controversy and political debate is to pervert the First Amendment in the name of preserving it. In his dissent in *Smith*, 844 P.2d at 500, Judge Arabian argues that confiscatory funding of extracurricular student groups is appropriate because "the university also has a major responsibility for the development of an enlightened and engaged citizenry." But as the majority observed:

> At the heart of the dissenting opinion is a frank proposal to sacrifice students' constitutional right not to be compelled to support political causes in order to teach them about the fundamental republican virtues upon which this nation was founded. The irony of that proposal speaks for itself.

Smith, 844 P.2d at 503.

Indeed, the University has previously expressly recognized that its interest in student debate does not supersede the First Amendment. University of Wisconsin Financial Policy and Procedure Paper No. 20 prohibits the use

of student activities fees for "activities that are politically partisan or religious in nature." In briefing before the Seventh Circuit, the University stated the policy was enacted "to protect students' rights under the First Amendment." *Southworth*, 151 F.3d at 730 n.11. Clearly, if the University's "educational" interests in the speech of student groups prevailed over students' First Amendment rights, such a policy would have been unnecessary.

Accordingly, if the "germaneness analysis" is to apply at all to the University as a whole, the University's purpose must be defined as academic instruction, since that is the University's primary purpose and it constitutes the unique role which the University serves to the common interests of all of its students. The University simply cannot claim, for purposes of the "germaneness analysis," that its purpose or governmental interest is so sweepingly educational as to include all of life and encompassing all those activities which are beneficial but not central to its academic curriculum.

C.

If Applied At All, The "Germaneness" Analysis Should Only Focus On The Associated Students Of Madison, The Official Student Representative Body.

The existence and function of independent student organizations simply does not serve any legislative purpose, and strict scrutiny should apply. But if the "germaneness analysis" is to be applied at all in this context, the analysis is best applied to the purpose and function of the Associated Students of Madison. That entity is both the representative of the student body and the entity which controls the distribution of allocated funds to the independent student organizations.

It should be observed at the outset that the Associated Students of Madison is not itself a party to this action. Respondent's challenge the University's mandatory funding policy. The challenge is thus whether the University has any justifiable basis for acting as collection agent for the Associated Students of Madison; there is no challenge to the decisions of the Associated Students of Madison once it receives those collected funds.[3] Nevertheless, applying the "germaneness analysis" to the University's forcible collection of funds requires an evaluation of the role and purpose of the Associated Students of Madison. As previously noted, the "germaneness analysis" has been applied in a limited context of statutorily-created representative entities serving a legislative mission to promote broader social stability and cohesiveness.

The Associated Students of Madison is the representative body which speaks for the University of Wisconsin students. It also has primary authority over most of the allocable funding. Because the Associated Students of Madison is a representative entity seeking to advance the "common cause" of the students in various ways, it is the entity whose purpose is of concern in applying the "germaneness analysis."

III.

EVEN UNDER THE REDUCED SCRUTINY OF THE "GERMANENESS ANALYSIS," THE UNIVERSITY OF WISCONSIN'S MANDATORY STUDENT FEE POLICY IS

---

[3]In any event, the University has final authority to approve or disapprove ASM's allocation of funds, pursuant to Section 36.09(5) of the Wisconsin code.

UNCONSTITUTIONAL

A.

The Support Of Political And Ideological Activities Of Independent Student Organizations Is Not Germane To The Representative Purpose And Function Of The Associated Students Of Madison

In its representative capacity, the Associated Students of Madison performs many valuable functions on behalf of the students. In addition to presiding over matters of student governance, it acts as a voice before the University on various issues, including review and recommendations for the use of non-allocable student activities fees (which cover debt service, fixed operating costs of auxiliary operations, student health services, and the first and second year of the recreational sports budget).

However, in the distribution of funds to the independent Registered Student Organizations, the Associated Students of Madison does not act in any representative capacity, i.e., it does not act in the interest of all students or seek to promote a "common cause". Indeed, the Board argued before the Seventh Circuit that funding did not constitute compelled speech precisely *because* "the organizations do not purport to speak for all students." *Southworth v. Grebe.*151 F3d 717, 732 (1998).

The Associated Students of Madison would be permitted, under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990); and *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991), to adopt its own specific positions and opinions on

matters of internal interest. But there is no broad governmental or social interest in the funding of private student organizations, nor is such funding "germane" or necessary to its role as representative of the students. None of the student organizations acts on behalf of the entire student body. A review of the eighteen organizations receiving student fees and engaging in political and ideological activities reveals that each of these organizations have highly specific political agendas which do not broadly reflect the interests of all students. Even taken as a whole, the organizations reflect a very narrow spectrum of political ideologies, with a decidedly heavy concentration of left-wing or liberal organizations. (There does not appear to be a single conservative or mainstream organization receiving ASM funding!)

The University cannot justify the mandatory payment of student activities fees without permitting allowance for objecting students, because the funding of political and ideological speech by registered student organizations is not germane to ASM's representative function, nor does it promote any common cause of the students. And in significant contrast to the legislative policy guiding *Int'l. Assoc. of Machinists v. Street*, 367 U.S. 740 (1961); *Abood*, 431 U.S. 209; *Lehnert*, 500 U.S. 507; and *Keller*, 496 U.S. 1, any legislative authorization for ASM's distribution for allocable funds does not appear to advance an overarching legislative policy to promote social cohesion and stability. In the absence of such strong legislative policy considerations, there can be no justification for compelling mandatory student fees, without accommodation to objecting students.

The discretion which ASM exercises in the funding decisions is also indicative of a lack of "germaneness." Germaneness applies to those functions which are central and

necessary to the representative entities' purpose and function. Funding of political and ideological student organizations cannot be "germane" when it is wholly elective and discretionary.

The lack of government regulation also reflects a lack of germaneness. Unions and bar associations are subject to substantial legislative or judicial control, reflective of the high governmental interest in those entities. Registered Student Organizations operate largely independent of University and ASM review, reflecting a correspondingly low governmental interest.

That funding such organizations is not "germane" to ASM's purpose and function is further underscored by the prevalence of unfunded organizations. Approximately 70% of the registered student organizations do not receive any ASM funding whatsoever. Clearly, the existence of such organizations is not dependent upon ASM funding, and thus the funding cannot be considered essential, necessary or "germane" to ASM's purpose and function.

Moreover, many of the activities of the political and ideological student organizations reflect substantial off-campus activities, and exportation of funds to support national parent organizations. This undercuts any claim that the funding of such organizations benefits the entire campus student body.

B.

The Mandatory Payment Of The Full Student Activities Fee And Any Student Referendum Assessment Is Not Narrowly Tailored And Is More Burdensome Than Necessary

The University's funding scheme also fails under the "germaneness analysis" because that analysis requires that, even if "germane," the activity must not intrude upon First Amendment liberties more than is necessary to accomplish its purpose. Even if the University could claim that it had a substantial interest in funding the political and ideological speech of registered student organizations, the evidence does not suggest that that interest would be undercut allowing accommodation to objecting students.

Allowing accommodations to dissenting students would not accomplish a complete defunding of political and ideological student groups (as argued in Justice Arabian's dissent in *Smith v. Regents of the University of California*; 844 P.2d 500 (Cal. 1993)). Respondents are only seeking an opportunity for dissenters to opt-out from the funding of such organizations. The University may continue to collect and disburse funds from non-objecting students.[4] Furthermore, the evidence does not suggest that political student groups depend upon University funding for their existence. That 70% of student organizations obtain no funding, and that many organizations receiving funding donate portions of it to parent organizations, suggests that university subsidies are not truly necessary.

Nor does the accommodation of such objections create any significant accounting difficulty for the University. The University need not permit piecemeal objections, with varied withholdings or refunds depending on the number of objectionable organizations receiving funding. The University

[4]There is no challenge to payment of the activities fee for non-political student organizations. That fee would continue to be required, and the organizations funded, in the same manner as before.

may simply impose a "zero-sum" withholding or refund policy, by which any objection to the funding of any ideological or political group results in a withholding or refund of the entire percentage of the allocable fee distributed among such groups.[5] Consent to any allocation would consent to all, but the student retains that freedom to choose.

There is no justifiable claim that allowing students to opt out of funding political and ideological activities would significantly deplete the resources available to such groups. Students who opt out would remain free to privately contribute to the organizations they might endorse and organizations remain free to solicit such contributions.

Nor can the university claim a significant concern with "free riders" since it presently permits membership in such groups by non-students, who pay no fees to the university at all. Additionally, students wishing to become members in various organizations might be required to pay a membership or a supplemental admission fee in the absence of proof of payment of the student activities fee.

The university simply has no compelling interest in subsidizing political and ideological activities of independent student groups, without accommodation to objecting students. Nor does the evidence demonstrate that the current scheme is narrowly tailored, and that the university cannot continue to adequately promote a diversity of such factions without such an accommodation.

Accordingly, even if the "germaneness analysis" is the

[5]Such "blind" objections would also avoid the dilemma of a student declaring his opposition to a particular group, which of itself may constitute compelled speech.

applicable test in this context, the funding scheme still does not survive constitutional scrutiny and an accommodation must be allowed to the objecting students. The compelled funding of the political and ideological speech of independent, Registered Student Organizations is simply not supported by a sufficiently strong governmental interest.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

Mathew D. Staver
LIBERTY COUNSEL
1900 Summit Tower Blvd.
Suite 560
Orlando, Florida 32810
(407) 875-2100

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In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL LEGAL FOUNDATION

In support of *Respondents*

Barry C. Hodge
Counsel of Record
for Amicus Curiae
The National Legal Foundation
11521-E Midlothian Turnpike
Richmond, VA 23235
(804) 897-2340

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INTEREST OF AMICUS CURIAE[1]

The National Legal Foundation (NLF) is a public interest law firm with fourteen years experience litigating First Amendment issues before various state and federal courts, including this Court. In addition, the NLF's in-house think tank, the Minuteman Institute conducts research into historical and jurisprudential issues relating to the First Amendment and the legal and political theories underlying both the Founding of our nation and contemporary legal debates.

The NLF deals daily with the issues presented by this case. The NLF believes, given the split in the federal Courts of Appeals on these issues, that a proper resolution of this matter is of great significance to America's students and to all citizens who speech might be compelled. Further, the decision reached by this Court will directly impact the course of future litigation that the NLF undertakes in the public interest.

The NLF believes that its insight into the issues presented by this case will be of assistance to this Court.

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[1] Counsel of record to the parties in this case have consented to the filing of this brief through blanket consent letters which have been filed with the Clerk. No counsel for any party authored this brief in whole or in part. To date no person or entity, other than the regular donors of the amicus curiae have made any monetary contribution to the preparation or submission of this brief. A grant application is pending with the Alliance Defense Fund for work done on this brief. The Alliance Defense Fund is a 501 c 3 organization that helps public interest law firms and private attorneys fund their work in the public interest. The Alliance Defense Fund did not control the content of this brief, did not help author it, and did not even see it prior to completion.

SUMMARY OF THE ARGUMENT

The panel decision of the Seventh Circuit was correct in holding that the mandatory student fees program at the University of Wisconsin-Madison violates the First Amendment of the United States Constitution. This conclusion can be reached either under the *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), test or by relying on first principles.

Under both the views of the Founding Fathers and this Court's precedents, the student fees, absent an opt-out provision for objecting students, constitute impermissibly compelled speech. In analyzing whether speech is impermissibly compelled, it is important to consider the freedom of conscience. Failure to take the freedom of conscience into account has led several jurists to wrong conclusions about mandatory student fee programs.

ARGUMENT

I. THE UNIVERSITY OF WISCONSIN-MADISON'S MANDATORY STUDENT FEE IS AN UNCONSTITUTIONAL COMPULSION OF POLITICAL AND IDEOLOGICAL SPEECH.

At the heart of this case is a proposition that was settled long ago by those who founded this nation: government cannot compel individuals to endorse or pay for ideas that violate their freedom of conscience. The three judge panel that decided the case at the Seventh Circuit saw the case this way. *Southworth v. Grebe*, 151 F.3d 717, 718 (7th Cir. 1998) (hereinafter, *panel decision*). Even those judges who dissented from the denial of rehearing *en banc* wrote nothing that would indicate disagreement with this proposition; rather they simply found no compelled speech. *Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) (Opinions of Rovner, J. and of Wood, J. each dissenting from denial of rehearing *en banc*.) (Hereinafter, *rehearing denial*).

Thus, whether one agrees with the panel or with the rehearing dissenters as to the proper application of *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) or of the test in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991),[2] all can agree that compulsion *vel non* is the heart of the controversy. The panel's key discussion of compulsion takes place in the context of the *Lehnert* test's third prong. *Southworth, panel decision*, at 730-31. However, it is equally valid as a stand alone discussion. Thus, should this Court find compulsion—and the main function of this brief is to demonstrate the existence of compulsion—it should conclude that the University of Wisconsin-Madison's (UW-Madison) mandatory student fee policy violates the First Amendment. This Court could so conclude either by embracing the panel's use of *Lehnert* or by resorting to first principles.

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[2] As the panel opinion pointed out, there is also a split in the circuits as to the proper application of *Abood* and *Keller*. *Southworth, panel decision*, at 723. Judge Rovner objected to the use of the *Lehnert* test, believing that it was not controlling. *Southworth, rehearing denial*, at 1126-27.

As will be discussed below, the panel's position is supported by this Court's precedents concerning compelled speech and demonstrates a proper understanding of first principles. The panel was thus correct when it characterized the UW-Madison program as compelled speech. On the other hand, Judge Wood's opinion, dissenting from the denial of rehearing *en banc*, demonstrates a misunderstanding of first principles in that she

> take[s] issue with the panel's fundamental premise—that the fee is a compelled subsidy of speech itself, rather than a compelled subsidy of a neutral forum for speech. In my view, there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, rehearing denial, at 1128.

The examination of this "dispositive" issue must compare the approach of the panel opinion and that of Judge Wood's opinion. This brief will also examine the approach of Judge Rovner, who also dissented from the denial of rehearing *en banc,* and the approach of the Ninth Circuit in *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999). *Rounds* is significant in that it is a mandatory student fee case decided after the panel decision was issued.

In its discussion of compelled speech, the panel quoted Thomas Jefferson from *Abood's* footnote 31: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Southworth, panel decision*, at 730 (quoting *Abood*, 431 U.S. at 234 n.31). It is important to note the larger context of the *Abood* footnote.

The discussion of compulsion in *Abood* to which the Jefferson quote is appended as a footnote is as follows:

> The fact that the appellants are compelled to make, rather than prohibited from making,

> contributions for political purposes [as was the case in Buckley v. Valeo, 424 U.S. 1 (1976)] works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See Elrod v. Burns, [427 U.S. 347, 356-57 (1976)]; Stanley v. Georgia, 394 U.S. 557, 565; Cantwell v. Connecticut, 310 U.S. 296, 303-304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642.
>
> These principles prohibit a State from compelling any individual to affirm his belief in God, Torcaso v. Watkins, 367 U.S. 488, or to associate with a political party, Elrod v. Burns, supra; see 427 U.S., at 363-364, n. 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.
>
> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining

> representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Abood 431 U.S. at 234-36 (footnotes omitted).

Footnote 31 occurs at the end of the first sentence in the quotation above. By examining the fuller *Abood* context, it is clear that the sentiment contained in the Jefferson quotation utilized in the panel opinion is fully consistent with the continuing jurisprudence of this Court, i.e., the panel did not simply extract some long-abandoned view of Jefferson and attempt to use it to prop up a result for which it could find no better support.

Quite to the contrary, as the *Abood* Court pointed out, there is a long line of cases which echo exactly the concerns of Jefferson. In fact, the concerns about compelled speech in the factual context of this case are more real today than ever before. As the panel pointed out: "The compulsion which Madison [read Jefferson] condemned is of heightened concern following *Rosenberger* [*v. Rector and Visitors of the Univ. of Va.*], 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) . . . ." *Southworth, panel decision* at 730 n.11.

The heightened concern occurs in the context of mandatory student activities fees because the entire fee is not being challenged. Appellees are not claiming that fees *cannot* be collected. Instead, they are merely contending that they cannot be *compelled* to fund beliefs with which they disagree. *Id.* at 721-22. Since fees *will be* collected, the panel had it exactly right when they wrote:

> If the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights.

Id. at 730 n.11.

Thus, the panel is correct in its realization that the concerns of Jefferson are pertinent today and indeed, more, so than ever under the facts before the Court. Moreover, the panel's discussion also provides the basis to reconcile its holding with that of *Rosenberger*. Rather than "the panel's decision appear[ing] to create a serious conflict with the premise underlying [this] Court's decision in *Rosenberger*" as Judge Wood claims, *Southworth, rehearing denial,* at 1127, the panel correctly applied this Court's precedent to the factual situation anticipated by Justice O'Connor in her *Rosenberger* concurrence. In a passage quoted in part by the panel, *Southworth, panel decision* at 722, Justice O'Connor wrote:

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. See, e. g., *Keller v. State Bar of California*, 496 U.S. 1, 15 (1990); *Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1977). . . . While the Court does not resolve the question here, the existence of such an opt-out possibility not available to citizens generally, provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, and from government funds generally. Unlike monies dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.

Rosenberger, 515 U.S. at 851(O'Connor, J., concurring)[3]

The panel's analysis is simple and correct. Mandatory fees do not create a conflict with *Rosenberger* provided students are allowed to opt out of political and ideological funding. *Southworth*, *panel decision* at 730 n.11.[4]

Thus there can be no real question but that the UW-Madison program, absent an opt-out provision, constitutes the kind of compelled speech that concerned Jefferson and that this Court has found to be unconstitutional in a variety of contexts, including the cases canvassed in *Abood* (*supra*, pp. 4-6).

II. THE ISSUE BEFORE THIS COURT MUST BE EXAMINED IN LIGHT OF THE FREEDOM OF CONSCIENCE

A. THE DISPOSITIVE ISSUE IS NOT FORUM-CREATION

While it seems clear that the UW-Madison program falls squarely within parameters of unconstitutional compulsion, there remains the argument advanced by Judge Wood that

> there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, *rehearing denial*, at 1128.

The prior discussion of the panel's handling of *Rosenberger* and of Justice O'Connor's anticipation of the problem now before the Court could, without more, dispose of Judge Wood's contention. However, there is another line of reasoning which supports the panel's opinion and undermines Judge Wood's position. Once

[3] The panel also pointed out the similar point made by the *Rosenberger* majority. *Southworth*, *panel decision*, at 722, (quoting *Rosenberger*, 515 U.S. at 840).

[4] Any difference in the administration of the student funds in *Rosenberger* and the student funds at UW-Madison does not impact the point being made here: the necessity of an opt-out provision for political or ideological speech.

again, this line of reasoning starts with the Founders and continues to this day in the precedents of this Court. This line of reasoning covers much of the same jurisprudential territory covered by the discussion of *Abood's* footnote 31, above. It requires, however, covering that territory from an additional vantage point. After all, Judge Wood herself interacted with *Abood* and *Keller* and found them of "only limited help," *Southworth*, *rehearing denial*, at 1129, because she believed that " a forum-creation analysis rather than a compelled speech analysis is appropriate." *Id.*

The added vantage point that is needed is a freedom of conscience analysis. While a compelled speech rubric and a freedom of conscience rubric are clearly related, something crucial gets missed when the freedom of conscience lens is not peered through. This is true of Judge Wood's position, as will be examined here, and of Judge Rovner's position and of the position of the Ninth Circuit in *Rounds*, both of which will be examined *infra*.

The importance of the freedom of conscience to our Founders is perhaps best exemplified by James Madison's famous *Memorial and Remonstrance*. 8 *The Papers of James Madison* 298 (Robert A. Rutland, et al., eds, 1973)

While there are clear differences between the UW-Madison program and the proposed 1785 Virginia "Bill establishing a provision for Teachers of the Christian Religion" against which Madison wrote, the principles apply with equal force to both situations. Indeed, as will be noted below, this Court has applied the principles of the *Memorial and Remonstrance* in several different contexts.

As is the case with the student fees at issue in the instant case, Madison faced a program which proposed to collect fees, i.e. taxes, from all citizens and disburse them in a manner violative of the freedom of conscience.[5] Indeed, under the wisdom of the

[5] Perhaps the key difference has already been pointed out by Justice O'Connor in her concurring opinion in *Rosenberger*. In the portion of her opinion quoted earlier, Justice O'Connor noted that the possibliity of opting out is a possibility in the case of the mandatory fees but would not be a possibility in a case involving

Memorial, UW-Madison's fee provisions allowing political and ideological funding would never have been adopted. Certainly, its wisdom at least mandates an anti-compulsion opt-out.

From a document replete with fundamental principles of the American experiment in ordered liberty, the excerpts which follow below warrant careful attention, both because they have continued animate this Court's jurisprudence and because they are particularly pertinent to the instant case. Of course, this Court is no stranger to the *Memorial and Remonstrance* nor to the debate over how to interpret it in an Establishment Clause context. See, e.g., the opinions of Justices Thomas and Souter in *Rosenberger*. *Rosenberger*, 515 U.S. 819.

However, we note that what Madison wrote about the freedom of conscience applies beyond the question of establishment of religion. Clearly, it applies to questions of the free exercise of religion and extends to freedom of thought and belief of a type not normally brought under the heading "religioun." This was made clear by this Court in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642.

Therefore as we look at the following language from Madison's *Memorial and Remonstrance*, we can take the keystone principle of freedom of conscience and apply it to the case now before this Court. In fact, the general principle may well be easier to apply to contexts other than establishment of religion. Madison wrote in part:

---

taxes. *Rosenberger*, 515 U.S. at 851(O'Connor, J., concurring). We will return to the significance of this *infra*.

> we hold it for a fundamental and undeniable truth, "that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men . . . .
>
> . . . .
>
> . . . . If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us . . . .
>
> . . . .
>
> . . . . "[t]he equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of Government," it is

> enumerated with equal solemnity, or rather studied emphasis.

8 *The Papers of James Madison* 298, 299-300, 304 (Robert A. Rutland, et al., eds, 1973).

The point, at bottom, is that compelling funding in violation of conscience is antithetical to the principles upon which this nation was founded. Madison stated this in the strongest of terms:

> it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it.

Id. at 300.

There is no doubt that students at UW-Madison, absent an opt-out provision, are compelled to fund speech with which they disagree. Judge Wood's analytical framework is incorrect when she writes that:

> there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, rehearing denial at 1128.

This way of framing the question presupposes that UW-Madison is *either* requiring its students to fund a forum *or* requiring them to support the speech of individual speakers. While one might conceive of a forum in which this "either/or" analysis could be correct, it is not correct *here*. What the UW-Madison program does

is require the students to *both* fund a forum *and* support, i.e. fund, individual speakers.

Clearly, under the previous discussion, this "both/and" requirement is unconstitutional. The appellees have not challenged the funding of the constitutionally permissible (albeit perhaps unwise) aspects of the forum. They have only challenged the unconstitutionally compelled funding of political and ideological speech. We have seen that under the wisdom of the *Memorial and Remonstrance*, UW-Madison would have been better off not funding political and ideological speech at all. However, having done so, it must allow an anti-compulsion opt-out. Once again, this reflects exactly the situation anticipated by Justice O'Connor and it is exactly the solution required by the panel.

Justice O'Connor's comments in her *Rosenberger* opinion also point out that the opt-out provision is available here where it might not be available in a pure taxing situation. *Rosenberger*, 515 U.S. at 851(O'Connor, J., concurring). This is another reason why the principle of freedom of conscience is easier to apply in a non-establishment of religion context: the debate between Justices Thomas and Souter over whether the *Memorial* was primarily addressing equality need not be resolved in favor of either view since that particular principle of the *Memorial* is not applicable to student fees. While the freedom of conscience must be honored in both situations, the present case at least has one complicating factor that can be eliminated.

Furthermore, the opt-out satisfies not only the view of James Madison in the *Memorial and Remonstrance*. Rather it satisfies the view of this Court on the question of conscience, as well. The opinions of this Court upon which the panel relied in its analysis all reflect the same concern Madison expressed in the *Memorial*. In canvassing, *Abood*, *Keller*, and *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, the panel noted several times the key passage from *Abood* and it use by the *Glickman* Court:

> Relying on our compelled speech cases, however, the [*Abood*] Court found that compelled contributions for political purposes unrelated to collective bargaining

> implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment[--]the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped *by his mind and his conscience* rather than coerced by the State." (quoting *Abood*, 431 U.S. at 234-35).

Southworth, panel decision, at 731 (quoting *Glickman*, 521 U.S. at ___, 117, S.Ct. at 2139).

An reexamination of the longer *Abood* passage quoted on pages 4-6, *supra*, through the lens of the freedom of conscience yields an interesting result. The first sentence addresses compelled funding:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes [as was the case in Buckley v. Valeo, 424 U.S. 1 (1976)] works no less an infringement of their constitutional rights.

Abood, 431 U.S. at 234 (footnote omitted).

However, the next portion of the quotation speaks the language of the freedom of conscience:

> For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See Elrod v. Burns, supra, at 356-357; Stanley v. Georgia, 394 U.S. 557, 565; Cantwell v. Connecticut, 310 U.S. 296, 303-304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

> > what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642.
>
> These principles prohibit a State from compelling any individual to affirm his belief in God, Torcaso v. Watkins, 367 U.S. 488, or to associate with a political party, Elrod v. Burns, supra; see 427 U.S., at 363-364, n. 17, as a condition of retaining public employment.

Abood, 431 U.S. at 234-35.

It is only thereafter that the *Abood* Court analyzed the compelled funding facts before it:

> They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher. We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235 (footnote omitted). The Court was clearly analyzing a compelled funding of speech case through a freedom of conscience lens.

The panel's application of the *Glickman/Abood* principle to the facts of the instant case is what was dispositive.

> In essence, allowing the compelled funding in this case would undermine any right to "freedom of belief." We would be saying that students like the plaintiffs are free to believe what they wish, but they still must fund organizations espousing beliefs they reject. Thus, while they have the right to believe what they choose, they nevertheless must fund what they don't believe.

Southworth, panel decision, at 731. We note as we did at the outset that this analysis is dispositive whether the case is decided under the *Lehnert* test or upon first principles.

Because Judge Wood did not look at the UW-Madison program through a freedom of conscience lens she identified the wrong element of the case as being dispositive. Similarly, Judge Rovner and the Ninth Circuit's *Rounds* opinion also failed to use the freedom of conscience vantage point and came to erroneous conclusions.

B. THE DISPOSITIVE ISSUE IS NOT ATTRIBUTION

Judge Rovner thought the critical issue was attribution. *Southworth, rehearing denial*, at 1125-26. She attempted to distinguish *Abood* and *Keller* on the ground that in those two cases "the recipients of the funds were themselves engaging in the challenged speech . . . [whereas] the recipient of the funds in this case is not itself engaging in the challenged speech, nor is that speech even attributable to it." *Id.* at1125. Judge Rovner repeatedly came back to this point and also pointed out that the appellees conceded that the funding arrangement is designed to create a forum and that they do not object to that. *Id.*

However, this brief has already addressed the fact that the UW-Madison program *both* creates a forum *and* compels speech. Because Judge Rovner missed the freedom of conscience vantage point, she concentrated on the issue of attribution. However, the key

factor in this Court's freedom of conscience/compelled speech jurisprudence is not attribution but rather contribution. Furthermore, the locus of the inquiry should not be on the recipient of the funds, but rather on the one who is compelled to give.

C. THE DISPOSITIVE ISSUE IS NOT WHETHER THE SPEECH IS "PERSONAL"

Finally, missing the freedom of conscience vantage point also led the Ninth Circuit to the wrong conclusion in *Rounds*. It is true that the *Rounds* court purported to distinguish its case from the instant case on factual grounds. *Rounds*, 166 F.3d 1040. Since there is a split in the circuits on the issue of student fees and since *Rounds* was decided subsequent to the issuance of the panel decision in this case, its analysis is "on the table."

It is important to note that its rational is flawed. The key for the *Rounds* court was whether the speech was "personal":

> Further, the challenge in this case does not present an instance of compelled *personal* speech, for no *personal* speech is compelled from anyone. No student is required to "confess by word or act" belief in any message, as was the case in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943). Nor is any student required to act as a courier for an ideological message, as was the case in Wooley v. Maynard, 430 U.S. 705, 715 (1977).

Rounds, 166 F.3d at 1038 (fotenote omitteed) (emphasis added).

In this assertion, the Ninth Circuit committed two errors. First, it is not true that the students were not required to "confess by word or act" a belief. They were required to "confess" a belief by the act of funding it. Second, by inserting the word "personal" in its description of the speech in question, the *Rounds* court introduced a foreign element into its compelled speech analysis. As this brief has demonstrated, neither Jefferson and Madison nor this Court has ever found the personal nature of the speech to be the critical element in assessing the validity of a measure. Over and over again, the

concern has been quite the opposite: one's freedom of conscience can be violated when one is compelled to give one's money to pay for someone else's speech. Because the *Rounds* court did not look through the lens of the freedom of conscience, it missed this point altogether. Instead, it lighted upon the rather unique aspect of Mr. Maynard's license plate and ignored the vast majority of compelled speech cases.

CONCLUSION

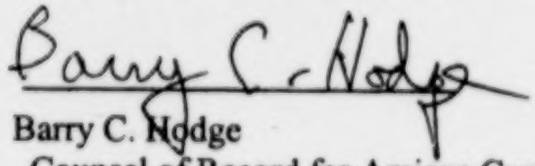
We end where we began. The heart of this case is a dispute that was settled long ago by those who founded this nation: government cannot compel individuals to endorse or pay for ideas that violate their freedom of conscience. Here, the UW-Madison student fee program does just that. Under the political theory upon which this nation was founded and under the precedents of this Court, the mandatory funding of political and ideological speech with which individual students disagree is clearly an unconstitutional compulsion.

When the writings of Founders such as Jefferson and Madison and the precedents of this Court are examined from the additional vantage point of freedom of conscience, we avoid certain analytical pitfalls. First, we see that the opinion of the Seventh Circuit panel is not in conflict with this Court's opinion in *Rosenberger*. Rather, the panel arrived at the only possible decision that was in harmony with *Rosenberger*.

Second, we avoid incorrect frameworks that can only lead to the wrong conclusion. The key is not forum-creation. It is not attribution. It is not the personal nature of the speech. The key is instead the simple proposition stated so long ago by Thomas Jefferson and reiterated by this Court in *Abood*: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31.

In light of the foregoing this Court should affirm the decision of the Seventh Circuit.

Respectfully submitted
this 13th day of August, 1999.



Barry C. Hodge
Counsel of Record for Amicus Curiae
The National Legal Foundation
11521-E Midlothian Turnpike
Richmond, VA 23235
(804) 897-2340

AMICUS CURIAE

BRIEF

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In The

Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,
Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS FIRST FREEDOMS FOUNDATION IN SUPPORT OF RESPONDENTS

MICHAEL D. DEAN

Attorney For Amicus

Dean & McKoy, S.C.
20975 Swenson Drive
Suite 125
Waukesha, WI 53186
(414) 798-8044

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INTEREST OF AMICUS CURIAE[1]

The First Freedoms Foundation is a non-partisan, not-for-profit, public interest organization founded to promote and defend individual civil liberties. The Foundation engages in research, public education, and public interest litigation.

Among its founding principles, the Foundation is concerned that expanding government progressively displaces private, voluntary systems of economic and social interaction. This displacement erodes and distorts the free market of ideas by forcibly directing private resources away from ideas which citizens themselves would otherwise choose to support. Instead, government uses those resources to support its own institutions and *fora* which tend inherently to discourage or prohibit advocacy of certain types of viewpoints -- for example, principles of limited government and theistic points of view.

The Foundation believes that the University of Wisconsin's coercion of students to support ideas they find abhorrent is particularly dangerous to First Amendment values and free society. The Foundation therefore respectfully offers its views that (1) historically, freedom of thought in higher education has been preserved by individuals pursuing truth for its own sake, not by government or ecclesiastical institutions controlling inquiry based on the perceived needs of those institutions or of society and (2) the University's forced

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was authored by counsel for *amicus curiae* and was not authored or contributed to by counsel for a party or by any other person or entity, either in whole or in part. Costs of submission of this brief in this Court have been underwritten by *amicus curiae*.

redistribution of students' resources disrupts and distorts individual participation in the free market of ideas.

INTRODUCTION

For millennia, learned men and women have struggled to pursue Truth wherever it leads. For even longer, prince and pope have struggled to restrain and subvert that pursuit for their own ends. The history of speech in the university is a history of that contest -- the struggle of scholars to pursue truth without restraint or subversion.

Throughout history, whether in the university or outside it, the single, indispensable constant in the marketplace of ideas has been that insistence and persistence of individual minds to pursue truth -- for no other reason than truth for its own sake and for their own integrity.

That principle is the essence of the First Amendment's protections and is the principle upon which this case should be decided. The University claims that compelled support for abhorrent ideas is necessary to change the content of the marketplace of ideas for the "greater good." But the pursuit of truth must never be sacrificed to official orthodoxy, whether religious or (as at present) social and political. The individual mind and conscience must always remain holy and inviolable. The University's forced subsidy of abhorrent ideas ought not stand.

I. IN THE HISTORY OF THE UNIVERSITY, THE SEARCH FOR TRUTH HAS DEPENDED ON THE CONSCIENCE OF THE INDIVIDUAL SCHOLAR

Assessment of mandatory student fees by government

universities to support student speech has emerged only recently as a widespread practice. *See,* e.g., Wiggin, A FUNNY THING HAPPENS WHEN YOU PAY FOR A FORUM: MANDATORY STUDENT FEES TO SUPPORT POLITICAL SPEECH AT PUBLIC UNIVERSITIES, 103 Yale L. J. 2009, 2011 (1994) (student fees at U.C. Berkeley appeared only about forty years ago).

This Court has indicated that it will consider the constitutionality of that practice under the rubric of cases dealing with fees compelled by labor unions and professional associations. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 840 (1995) (*citing Keller v. State Bar of California*, 496 U.S. 1, 15 - 16 (1990) and *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235 - 236 (1977).

However, even though *Abood* and *Keller* may ultimately provide the First Amendment's controlling principles, a university campus is a very different place with very different functions than labor unions or professional associations. Rather than duplicate the parties' discussion of *Abood* and *Keller*, *amicus* suggests that those cases should be applied within the historical context of the institution under scrutiny. (Establishment clause issues have been similarly considered in an historical context. *Everson v. Board of Education*, 330 U.S. 1, 33 (1947) (J. Rutlege, dissenting).

A. The Archetypes.

Socrates and Plato's Academy are the archetypes of those seeking truth for its own sake. This tradition has never concerned itself with the "social utility" of the search for truth, much less has it tolerated the state dictating the manner in which those who seek it must spend their time and resources.

In the *Apologia*, Socrates states, "Men of Athens, I honor and love you, but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy . . . . [A]re you not ashamed of heaping up the greatest amount of money and honour and reputation, and caring so little about wisdom and truth and the greatest improvement of the soul . . . . " APOLOGIA, reprinted in TEN GREAT WORKS OF PHILOSOPHY 24 (Robert Wolff, ed., 1969).

Plato's Academy maintained the same, dire independence from political fashion. It "did not exist in any immediate way for the benefit of the community; indeed, Plato and his pupils commonly were at odds with their community, in a political sense. The allegiance of the Academy was to something grander even than Athens: to Truth." RUSSELL KIRK, ACADEMIC FREEDOM 12 (1955). In fact, the "community" put "the first of its great thinker to death, forced the second to flee to Magara and Syracuse, and compelled the third, on occasion, to take refuge in Asia." *Id.*, at 11.

Thus, freedom of thought was historically grounded on the individual's pursuit of truth for its own sake and that of the seeker -- often in direct antagonism to the community and its institutions. The University's current efforts to subordinate individual judgment to the "greater needs" of the community is therefore a subversion of the very truth it purports to seek.

B. The Medieval University.

Medieval universities were "centers of power and prestige, protected and courted, even deferred to, by emperors and popes." RICHARD HOFSTADTER AND WALTER METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES

5 (1955)[2]. They were "autonomous corporations, conceived in the spirit of the gilds" which maintained independence by existing in the "interstices of medieval society," playing pope and king against each. *Id.* at 6, 7. Further, the masters' poverty made valid the threat to cease lectures and migrate, costing those who offended them prestige, power, and valuable trade brought by students. *Id.* at 6.

Yet the very autonomy of the university allowed the gild structures to exercise restraint against their own members. *Id.* at 12. Individual scholars also intimidated each other with personal attacks and accusations of heresy. *Id.* at 28. And in the fields of theology and philosophy, scholars searched for truth within narrowly fixed limits created by fundamental, unquestionable religious doctrines. *Id.*

Still, harmonizing Greek and Christian thought left fertile ground for creative thinking and forceful dispute. *Id.* at 14. To avoid suppression, scholars developed the "disputation," a device to acceptably propose unorthodox propositions in hypothetical form. *Id.* 14, 20. Scholars also read Aristotle in secret, flaunted bans, fled to jurisdictions of sympathetic sovereigns, and published speculative writings under assumed names. *Id.* at 21, 24, 28. Abelard justified interrogations which caused doubt on the grounds that they led to inquiry which led to truth. *Id.* at 29.

In contrast to Aquinas who escaped censure by harmonizing Christianity and Aristotle, Averoess (and later, Siger de Brabant) escaped it by assigning the natural order to philosophy and reason and the supernatural order to theology

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[2] Hofstadter and Metzger's work is the acknowledge authoritative source on the history of academic freedom and is cited extensively.

and faith. *Id.* at 33. This duality was perhaps the earliest form of free thought, allowing speculation based upon natural reason outside the confines of theological dogma. *Id.* 33 - 37.

Despite these difficulties and ruses, the scholars' autonomy and achievement ultimately arose from their service to truth, not to the community.

> [I]n the Middle Ages, as in classical times, the academy possessed freedom unknown to other bodies and persons because the philosopher, the scholar, and the student were looked upon as men consecrated to the service of Truth . . . . The community did not create the privileges of the Academy any more than the community created wisdom; rather, the community simply recognized the justice of the Academy's claim to privilege. The community did not expect to be served, except in the sense that it might be so fortunate as to gather some crumbs that feel from the academic table. Like Socrates and like Aquinas, the learned man, the teacher, was a servant of God wholly, and of God only. His freedom was sanctioned by an authority more than human.

ACADEMIC FREEDOM, *supra* at 17 - 18.

C. Renaissance and Reformation.

As the Reformation dawned, papal power declined as Reformers and Counter-Reformers appealed to civil authority for protection. But as sovereigns became champions and protectors, the balance of power which had previously allowed autonomy from both pope and prince was lost. *Cujus regio* placed conscience and intellect at the service of the state.

Finally, as the Church's power and universality waned, so did the ecclesiastical nature of intellectual life and its extra-nationality. Nation states emerged in the vacuum of papal power, exercising control over universities whose masters were now financially dependent upon them. THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, *supra* at 38 - 39.

Aristotelianism itself became a new dogma, against which humanistic scholars revolted through the hypothetical statement and "probabilism," a device by which one could challenge the rationality of any orthodoxy without conclusively denying it. *Id.* 36 - 37. Duality evolved as a method to protect theology from the effects of skepticism and science (or *vice versa*, depending upon one's allegiances). *Id.* 38 - 39.

Those devices ultimately cost theology intellectual respect, and as belief in the universities' divine sanction waned, so did their power. Although the Italian universities exercised some leadership, the intellectual torch passed to new humanistic scholars outside the university and the Church who were protected and supported by patrons, sovereigns, and the papal court itself. *Id.* at 43 - 44.

In Italy, this new freedom from the Church gave rise to thinly veiled skepticism. In the north, the Christian humanists retained allegiance to the Church, but demanded broader scholarship and study of original sources which they believed would more effectively establish the faith and the original, ethical spirit of Christianity. But the humanist's insistence on examining original sources was opposed by churchmen who correctly foresaw that resort to original sources would undermine church authority. Erasmus and humanist scholars remained largely outside the universities rather than suffer restrictions of the churchmen's opposition. *Id.*, at 46 - 49.

In the early 16th century, Reuchlin, a Hebrew scholar, opposed an edict to destroy all Jewish sources, and a group of humanists circulated a scathing *ad hominem* against the edict's supporters. This effort is the first known instance of scholars rallying in general support of the scholarly enterprise. Erasmus issued a letter calling for respect of the search for truth and for other sincere scholars which, while not persuasive in its time, was the first singular statement of the spirit of freedom for *bona fide* intellectual inquiry. *Id.* at 50 - 52.

The labors and persecutions of Copernicus and Galileo are well known, but less known is that courageous defenders arose within the Church itself. Campanella's DEFENSE OF GALILEO was "the first reasoned argument to be published in support of the freedom of scientific investigation." THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, *supra* at 57. It asserted that proper authority existed to question Ptolemaic geocentrism (long since incorporated in church dogma) and that suppression of God-given faculties of sense and reason transgressed the "natural law of God." *Id.*, at 58.

Campanella also expressed the first germ of "marketplace" theory ("If Galileo's theory be unsound it will not endure") and introduced the phrase "*libertas philosophandi*," the forerunner of "academic freedom." The Church ignored Campanella's argument, suppressed Galileo, and drove scientific inquiry outside the universities into private scientific societies where scholars pursued truth in greater freedom until well into the 18th century. *Id.* at 60 - 61.

Thus, in preserving intellectual inquiry during the Renaissance and Reformation, the constant was not the institutions of church, state, or university but, as before, was individual commitment to truth.

D. The Enlightenment.

The Reformation's threat to the Church initially led to suppression of inquiry and intellectual freedom in both camps, lest questioning be taken for doubt and doubt be taken for admission of error. Academic autonomy began its slow re-emergence only after religious tolerance began to take hold -- the result of rising commerce, protests of religious minorities, pleas for tolerance and freedom from secularists and ethical Christians, and civil authorities demanding order after two centuries of havoc. *Id.* at 58 - 62.

Academic and religious freedom thus grew side by side because they had "one root in common: both are based upon the freedom of conscience, hence neither can flourish in a community that has no respect for human individuality." *Id.* at 62. The freedom that arose, however, was one of mutual accommodation among internally orthodox institutions. Scholars could choose their religion, but individual institutions generally attempted to enforce their own orthodoxy within their confines.

As academic and religious toleration grew, several principles of modern intellectual freedom grounded in individual rights began to crystallize: (1) the ultimate appeal to individual conscience and reason, which was inevitable once open competition among sects became possible, (2) charity or "tolerance" of other opinions, urged by humanists as being more faithful to Christian ethics, (3) "fallibilism," the recognition that man is prone to error and that no one individual can presume himself an exception with the right to enforce his opinions on others, (4) the conviction that injurious actions, not wrong opinions, were the only proper subjects for prosecution or penalties and (5) secular morality, the belief that

a common morality is available to all by natural reason, and that right doctrine is not its indispensable prerequisite. *Id.*, at 64 - 67.

As in earlier epochs, freedom to pursue truth again survived because of the adamance and perseverance of individual scholars, in spite of the religious and political institutions which abused and suppressed them.

E. The American Experience.

History has emphasized religion's abuses of intellectual liberty. However, as soon as it came to power, the "republican" state proved itself no less capable of controlling scholars for its own ends. Early American universities were, without exception, denominational seminaries created primarily for training of ministers. But as republicanism swept across the Atlantic, the universities became political prizes contested by opposing political, religious and social factions.

William and Mary, for example, was an integral part of the Virginia Anglican establishment. But in 1776, Thomas Jefferson introduced a bill in the Virginia legislature to change the college's corporate charter, eliminate divinity from the curriculum, and render it a republican institution to develop political and social leaders for republican society. Jefferson was defeated by Anglican and other religious interests, but he partially implemented his plan as governor in 1779. He saw it completely realized in 1819 with the creation of the University of Virginia.

While Jefferson was devoted to intellectual freedom of the faculty, his devotion clearly did not extend to those faculty who thought that the study of divinity was important. GEORGE M.

MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY 54 (1994); Mark D. McGarvie, CREATING ROLES FOR RELIGION AND PHILANTHROPY IN A SECULAR NATION: THE DARTMOUTH COLLEGE CASE AND THE DESIGN OF CIVIL SOCIETY IN THE EARLY REPUBLIC, Vol. 25, No. 3, J.C. & U.L. 527, 537 - 38 (1998).

The late 18th and early 19th centuries saw the same struggles repeated throughout the states. In Massachusetts, after a long battle for state control, the legislature finally granted Harvard its independence. It ceased supporting Harvard and, instead, provided funding for "republican" Williams and Bowdoin colleges. (This measure did not satisfy Boston's republican editors who continued demanding that the state take control of Harvard.) McGarvie, *supra* at 541.

In 1819, *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819) became a watershed in the struggle for control of the universities. Corporations had long been created solely for public purposes and only by direct legislative action. However, Chief Justice Marshall established that corporations could be a private, voluntary associations outside state control, even if they were created for public or charitable purposes. McGarvie, *supra* at 555.

Thereafter, legislatures aggressively pursued direct legal control of colleges and their faculties. At Maine's 1819 constitutional convention, one delegate proposed that no school should receive support unless "the Governor and Council shall have the power of revising and negativing the doings of the trustees and Government of such Institution . . . ." *Id.* at 563 (quoting JEREMIAH PERLEY, THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS OF THE CONVENTION OF THE DELEGATES ASSEMBLED AT PORTLAND ON THE 11TH AND CONTINUED UNTIL

THE 29TH DAY OF OCTOBER, 1819, FOR THE PURPOSE OF FORMING CONSTITUTION FOR THE STATE OF MAINE 281 (Charles E. Nash, ed., 1920) (1894).

But another delegate expressed the historic abhorrence against external control of the pursuit of truth. He was "mortified," and accused the state of "imposing shackles" on the college. "Are we too ignorant even to be made sensible of the importance of knowledge? And does Massachusetts therefore undertake to prescribe for us?" MCGARVIE, *supra* at 564 (quoting PERLEY, *supra* at 290).

Thus, as the secular state supplanted organized religion as the primary social power, it was just as eager as the Church to take control of the university. As before, it was neither church nor state which protected the pursuit of truth, but individuals dedicated to its pursuit for its own value.

F. Modern Zealotry.

Modern academe claims great progress in protecting intellectual freedom. But the integrity of intellectual inquiry is under no less threat today than before. NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM 55 (1995).

> Zealotry hostile to freedom of academic thought and speech has historically originated in a variety of sources: lay boards of trustees and administrators, the lay public, government, and, in the 1960's, students. The newest threat is from the group that academic freedom was designed to protect: the professoriate itself. *Id.*

A recent symposium collected papers examining

McCarthyism, "1960's Student Activism" and "1990's Faculty Fundamentalism." Hamilton, SYMPOSIUM ON ZEALOTRY AND ACADEMIC FREEDOM 22 Wm. Mitchell L. Rev. 331 *et seq.* (1996). The rabid demand for "relevance" in the 1960's led ineluctably to political correctness in the 80's and 90's -- the ultimate "triumph" of defending scholarship based on perceived social utility rather than the absolute right and value of pursuing truth for its own sake.

G. The University of Wisconsin Experience.

The University of Wisconsin has been subject to the same pressures against individual pursuit of truth as every other institution throughout history. Although the Regents have attempted to synthesize the pursuit of truth for its own sake with its pursuit for the sake of social utility, the tension between those objectives is inevitable and problematic.

The University is a land grant university created and governed by the state through its Board of Regents, and epitomizes the view that a university should serve the needs of the state. "The Wisconsin idea" is that "the boundaries of the campus are the boundaries of the state." W. LEE HANSEN, ACADEMIC FREEDOM ON TRIAL 15 (1994).

During a 1957 ceremony rededicating a plaque in front of Bascom Hall (the University's "seat of power"), the Regents stated that they were attempting to "employ with utmost energy the power of truth and freedom for the benefit of mankind." *Id.* at 6. On the rededicated plaque are engraved the following words:

> WHATEVER MAY BE THE LIMITATIONS
> WHICH TRAMMEL INQUIRY ELSEWHERE, WE

> BELIEVE THAT THE GREAT STATE UNIVERSITY OF WISCONSIN SHOULD EVER ENCOURAGE THAT CONTINUAL AND FEARLESS SIFTING AND WINNOWING BY WHICH ALONE THE TRUTH CAN BE FOUND." (TAKEN FROM A REPORT OF THE BOARD OF REGENTS IN 1894.) MEMORIAL, CLASS OF 1910.

Id. at 66 - 67.

Despite their uncompromising tenor, those words have an equivocal history. ACADEMIC FREEDOM ON TRIAL was published in 1994 as a centennial commemoration of the watershed investigation of Professor Richard T. Ely who was director of the University's School of Economics, Politics and History in 1894 -- the year of the Pullman strike, a national depression, and exceptional social unrest. Though he was apparently a social conservative and a devout "social gospel" Christian, Wisconsin's Superintendent of Pubic Instruction, Oliver Wells, publicly attacked him as being morally unfit, an anarchist, and a union sympathizer and instigator of boycotts.

After a hearing before a committee of the Board of Regents, Ely was fully exonerated. Although the incident galvanized support for Ely's right to address economic and labor issues (Frederick Jackson Turner was a faculty member under Ely's direction and an ardent defender), Ely did not defend against Wells' charges on the grounds of academic freedom. Instead, he mounted a "prudential" defense, denying the specific charges but conceding that, if the charges were true, his dismissal was warranted.

To the committee's credit, it issued a report which asserted

academic freedom. "In all lines of academic investigation, it is of the utmost importance that the investigator should be absolutely free to follow the indications of truth wherever they may lead." *Id.* at 67. The words inscribed on the Bascom Hall plaque were lifted directly from the report and, in Ely's own words, they became "a beacon of light in higher education in this country" and a "part of the Wisconsin Magna Charta."*Id.*

"Continual and fearless sifting and winnowing" have been University watchwords ever since. Nevertheless, Ely's pusillanimous defense illustrates the perennial pressures to restrain aggressive inquiry which challenges the status quo.

In 1927, for example, the University opened its "Experimental College," a dramatic experiment in freedom of inquiry under the direction of Alexander Meiklejohn. Students lived and worked with staff in the same dormitory, had an exceptional reading program but no exams, produced their own plays and literary works, participated in the state legislative process, engaged in political demonstrations and, in general, exhibited "uninhibited zest for thought and for action" to which the regular university was not accustomed. ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM (Cynthia Stokes Brown, ed.) 22 - 23 (1981).

The Experimental College closed in 1932, not only for a lack of funding, but because of pereniall problems which have always inhibited free thought. A small but vocal contingent of communist students was continually monitored in the state press. (One member arrested in a Milwaukee labor demonstration later ran for governor of Wisconsin from his residence in the Milwaukee County House of Correction.) When the University refused to permit Bertrand Russell's wife to speak on campus because she advocated premarital sex, the

College formed a Free Speech Club and arranged for her to speak in the Unitarian Church. She was the Meiklejohns' guest, as Bertrand Russell had been the previous year, and the Meiklejohns were ostracized by the Madison community.

Parents were also concerned that their sons (the College admitted only men because co-ed dormitories were impermissible) were not being properly prepared for a position in the tight Depression era labor market. Others were deterred by the high percentage of Jewish students the College attracted. There were tensions within the University itself as the College of Letters and Sciences continued to demand examinations and grades. Professional rivalries developed with faculty not involved in the College, and Meiklejohn himself was at odds with the University because of its reluctance to experiment.

Resentful faculty, students and administrators spread rumors that the College would be abandoned -- which it shortly was when its faculty refused to make program concessions requested by a committee from Letters and Science. President Glenn Frank refused to support the College because he had no support within the community. The Regents removed him five years later without due process and with no protest from faculty. *Id.* 20 - 35.

At present, the University congratulates itself that these unfortunate incidents are ancient history and that it has developed faculty rights and due process which prevents them from happening again. FREEDOM ON TRIAL, *supra* at 5 - 8 and *passim*.

Others, however, suggest that the situation may be worse than ever. The 1970 class of *alumnus* Dr. Mordecai Lee, for example, never even participated in a graduation ceremony

because student radicals were allowed to shut down the University. ACADEMIC FREEDOM ON TRIAL, *supra* at 209. University Professor E. David Cronon states that

> For nearly three decades since the turbulent protests against the Vietnam War,[3] it has been risky and sometimes impossible to invite to the campus speakers whose unpopular ideas are opposed by one student group or another, lest they be heckled, shouted down, or even physically threatened. The result is a self-imposed censorship and conformity that denies the campus community the opportunity to hear all points of view. It makes a shameful mockery of the sifting and winnowing ideal.
>
> What is more disturbing is that it has been a long time -- decades, in fact -- since the faculty as a body, or a top campus administrator, or a regent has spoken out forcefully and taken a strong stand against this form of censorship by student storm troopers.

Id. at 249.

More recently, the University adopted its infamous "Hate Speech Code" in 1989 which was eventually ruled unconstitutional by District Judge Robert Warren. *Id.* at 216 - 20. Dr. Lee himself expresses the tension inherent in any university created expressly to serve the state.

The UW-Madison faculty may wish for the

---

[3] Perhaps the most tragic event in University history was the death of a graduate student killed when student radicals bombed the University math center which they believed was conducting military research.

academic freedom of their counterparts in private institutions. But, the context of their academic freedom, as part of a state government, means that the academic freedom they get is somewhat different. The UW faculty needs to recognize this reality of being part of state government and develop a concept of academic freedom consistent with it.

Quality teaching, community service, and applied research are what the taxpayers want in return for their investment. The cry for the "relevance" that typified the student protest movement in the sixties is returning, and now it is coming from the people who hold the purse strings. *It is time to redefine what academic freedom means in a public university in the 1990's.*

Id. at 215. (Emphasis added.)

These regrettable anecdotes demonstrate once again that preservation of bold, original inquiry will never lie in a group or in an institution. Instead, it will always lie with individuals, master and scholar alike, who follow truth where it leads them and who refuse to acquiesce or conform, regardless of current fashion.

H. Summary.

In summary, assaults on freedom of inquiry throughout history have come from all quarters -- from church, state, patron, students, fellow scholars, the university itself. The pursuit of truth has survived, not because of social, political or institutional commitment, but because individual scholars have defied fashion and authority to pursue the truth as they see it.

In this case, a few individual scholars have courageously challenged the University because it extracts from them fees to support ideas which offend their consciences. The greatest service this Court can render is to end that violation of conscience. The First Amendment does not and ought not countenance a soulless, bureaucratic program on the vacuous rationale that it is necessary to offend the conscience of one so that he will learn not to offend the conscience of another.

II. COMPELLED SUPPORT FOR ABHORRENT IDEAS DISRUPTS THE MARKETPLACE ESSENTIAL TO THE PURSUIT OF TRUTH

The University claims that coercing students to fund ideas they find abhorrent serves the greater good of expanding the "marketplace of ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). However, violating any individual's decision and conscience inevitably damages not only the violated individual, but also defeats the purposes the marketplace of ideas is intended to serve.

A. Granting Exemption from the Fee System Will Not Limit Speech at the University.

The University claims that granting exemptions to objecting students will endanger campus speech. But Respondents comprise only a handful of the University's 40,000 students. Funds lost by granting the exemptions would be infinitesimal. On the other hand, if such exemptions did spark a mass exodus by other students, such exodus would be compelling evidence of the fee program's injustice. The greater the exemption from the program, the greater the evidence that the views it subsidizes do not reflect the views of those compelled to support it.

B. The Fee System's Facial "Content Neutrality" Belies Bias Inherent in Selecting Which Groups Will Receive Funds.

Numerous scholars have noted the obvious problem that interference in the market by *any* governmental structure disturbs the free flow of ideas and has the inevitable effect of perpetuating the orthodoxies preferred by those in control of the structure. (*See, e.g.*, Brietzke, HOW AND WHY THE MARKETPLACE OF IDEAS FAILS, 31 Val. U.L. Rev. 951 (1997); Wonnell, TRUTH AND THE MARKETPLACE OF IDEAS, 19 U.C.D. L. Rev. 669 (1986); Ingber, THE MARKETPLACE OF IDEAS: A LEGITIMIZING MYTH, 1984 Duke L.J. 1 (1984).

The University's policy does just that. Although it contains no overt criteria discriminating against applicants based upon the content of their speech, it leaves to small student ommittees the final decisions over which groups will or will not receive funding. The policy does not (and, as a practical matter, can not) control the biases of those students empowered to make such decisions. Funding decisions thus inevitably reflect their individual preferences and value judgments.

C. The Fee System Is Subject to Abuses Characteristic of All Subsidized Programs.

The program is also subject to all-too-familiar abuses attendant in any program of governmental subsidy. For example, it clearly encourages *bolshevik* style efforts to control the committees empowered to make grant decision. It also encourages scheming by relatively few students to form a multiplicity of small, coordinated groups, thereby garnering and controlling a greater percentage of available funds.

The subsidies also bring into existence less valuable speech because the very rationale of the subsidies is that without them, faculty and students would see fit to utilize their existing resources to support speech other than that approved by the committees. The process thus substitutes the judgment of a small number of students for the individual of all other students.

Subsidies also ultimately confer disproportionate benefits on authoritarian students who have no qualms about taking the property of others to support their own ideas. Across the political spectrum, authoritarians hold in common the belief that government compulsion is morally justifiable to modify otherwise free choices of their fellow citizens. In contrast, the beliefs and consciences of individualists (such as libertarians and proponents of limited government) prohibit them engaging in such tactics The differing inhibitions of these groups make it inevitable that one will benefit more from subsidies or other forms of official compulsion than will the other.

The student fees program, like all forms of official compulsion, tips the scales in favor of those who employ political force rather than rational persuasion. As Justice Douglas stated, "When we force people to listen to another's ideas, we give the propagandist a powerful weapon . . . ." *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 469 (1954) (Douglas, J., dissenting). How much worse then, when government forces objectors not merely to listen to abhorrent speech, but to *pay* for it.

Further, as with other entitlements, the greatest injury done by the speech subsidies is not that inflicted upon those whose property is taken to support ideas they abhor, but is rather the injury inflicted upon those who receive the support. Such

recipients of intellectual welfare come to believe that their ideas are more merititorious than the free market warrants and that they are entitled to the support of others -- if not voluntarily, then upon pain of force and forfeiture. The tragedy is that the university community at large comes to believe that compulsion and subsidized thought is *rerum naturum*, and it loses the will to oppose the "storm troopers" of which Professor Cronin complains.

Finally, the University also argues that the students come to campus knowing that the fee system is in place. But this claim also admits that the University is tampering with the market. The very existence of the fee system is, in fact, an admission by the University that it is not satisfied in some respect with the quantity, quality, or diversity of viewpoints which would arise if students were left to themselves.

Further, it is doubtful that students are even aware of the arcane system of fees and disbursements when they come to campus. But even assuming that they are, there is no way to know whether they came *because* of it or *in spite* of it. It seems far more likely that those who oppose the system on grounds of conscience may be dissuaded from attending the University at all, thus actually limiting rather than broadening the range of ideas on campus.

D. The Fee System Damages Civility and Reason.

The University's relies heavily on the program's"content neutrality." One can only hope that the University does not really mean it.

The archetype colloquium was a community of masters and scholars, respectful of truth and of each other. But a truly

"content-neutral" process destroys respect for both. If the University persists in its program, even the most unsophisticated undergraduate will, in time, come to question its sincerity and, ultimately, its rationality.

Content neutrality destroys civility in two ways. "Substantively," if the process is truly neutral, then anyone must be eligible for funding irrespective of his teachings, no matter how pernicious. Does the allocation process really not distinguish between the Student Council and the Aryan Nation? Between the NAACP and the Ku Klux Klan? How can the University expect any student to respect a "content-neutral" process which forces him to subsidize vitriolic attacks against himself and principles he holds dear?

"Procedurally," campus debate should certainly vigorous. But a free, uncompelled exchange of ideas is the greatest guard of civility and market effectiveness because it requires two *willing* participants. In a voluntary exchange of ideas, just as in a free and open economic exchange, the audience can simply refuse to listen and walk away if judge the proponent to be absurd, abusive, disrespectful, inconsequential or insincere.

Compelled support for abhorrent ideas destroys that fabric on which the market depends. One forced to support an abhorrent idea has no chance to "walk away" from its proponent, regardless of how uncivil or irrational that proponent may be. In place of voluntary respect for truth and others, forced subsidy breeds pernicious resentment.

"Content-neutral" disbursement of funds also damages rationality. If the University is taken at its word, its methodology prohibits from distinguishing not only on a political basis, but on a rational basis as well. Refined thought

is afforded no greater chance of support than thought which is patently absurd. One is confronted with the Kafkaesque picture of the University standing beside its students, scooping up chaff and detritus, and dumping it back in the basket just as fast as the students can "sift and winnow" it out.

Amicus does not ascribe such irrationality to the University or the students making the funding decisions, nor does it suppose that there are no outer limits of rationality or decency which preclude some speech from being subsidized.

Instead, *amicus* suggests that any pledge of "content-neutrality" is at best naive and at worst disingenuous. Again, such patent defects breed disrespect for the University, for civility, and, ultimately, for reason itself.

CONCLUSION

As in many First Amendment cases, the symbolic effect of this Court's decision is as important as the substantive result. Granting students an exemption from fees to support speech they find abhorrent sends a critical message: an idea should survive because it is persuasive and because its adherents are committed, not because of their wretched ability to extract subsidies from those with whom they disagree.

Instead of a system of compelled support for ideas one finds abhorrent, the University should instill in students an unassailable, "Camelot"-like vision -- that they should convince others by their enthusiasm and the force of their arguments, not by exercising the power of the state to extract support from their opponents.

Justice Douglas expressed this ideal in the context of

religious ideas. This Court should "sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

The search for truth has always depend on the dogmatic, uncompromising, insistence of the single individual to think for himself. *Amicus* urges the Court to protect the true guarantor of the search for truth, the sanctity of the individual human mind.

Respectfully submitted,

MICHAEL D. DEAN
Dean & McKoy, S.C.
20975 Swenson Drive.
Suite 125
Waukesha, WI 53186
(414) 798-8044

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Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *ET AL.*,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE COMMITTEE FOR A CONSTRUCTIVE TOMORROW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 588-0302

DANIEL E. TROY
Counsel of Record
DAVID R. HILL
WILEY, REIN & FIELDING
1776 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 719-7000

AUGUST 13, 1999

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and publishing educational materials that promote, *inter alia*, a limited and an accountable government, the proper role of the judiciary, and the First Amendment's protection of freedom of speech.

In particular, WLF has appeared as *amicus curiae* in or as party to cases supporting freedom of speech under the First Amendment. *See, e.g., Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996); *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Washington Legal Found. v. Henney*, 1999 U.S. Dist. LEXIS 11419 (D.D.C., July 27, 1999). WLF also has supported the First Amendment rights of those who object to being compelled to subsidize speech with which they disagree. *See, e.g., Glickman v. Wileman Bros.*, 117 S. Ct. 2130 (1997); *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996 (5th Cir. 1996), *aff'd sub nom.* on Fifth Amendment Takings Clause issue, *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998);

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[1] The Washington Legal Foundation and the Committee For A Constructive Tomorrow hereby declare that counsel for a party did not author this brief in whole or in part, and that no person or entity other than *amici curiae* and their counsel have made a monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consents of the parties which have been filed with the Clerk.

Keller v. State Bar of California, 496 U.S. 1 (1990); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1 (1986); *Hollingsworth v. Lane Community College*, 173 F.3d 860 (9th Cir. 1999) (mem.).

In addition, WLF's Legal Studies Division produces and distributes numerous publications, reports, and analyses on a variety of issues, including First Amendment freedom of speech issues. *See, e.g.*, Bork, *Activist FDA Threatens Constitutional Speech Rights* (WLF Legal Backgrounder, Jan. 19, 1996); Kozinski, *Who's Afraid of Commercial Speech?* (WLF Legal Backgrounder, Sept. 21, 1990); Rucker, *Compelled PIRG Student Fees Offend Constitutional Freedoms* (WLF Legal Opinion Letter, May 10, 1996).

The Committee For A Constructive Tomorrow (CFACT) is a Washington, D.C.-based nonprofit public interest organization that promotes free-market and safe technological solutions to current consumer and environmental concerns. CFACT has more than 35,000 citizen supporters throughout the United States and has an advisory board of more than forty leading scientists and experts from a variety of prestigious universities, laboratories, and policy centers around the world. Over the last thirteen years, CFACT has worked with college and university students across the nation to halt the forced subsidization of the various campus Public Interest Research Groups (PIRGs) which have a preferred funding status over all other student organizations.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt the Statement of the Case as presented in the brief of the Respondents.

SUMMARY OF THE ARGUMENT

The First Amendment prohibits state and federal governments (as well as their agencies and instrumentalities) from compelling private speech or from compelling a person to financially support private speech. The government can justify an exception to this rule only if it demonstrates: (a) the existence of an important governmental interest that it can accomplish only by compelling a person to speak or to financially support private speech; *and* (b) that the private speech at issue is "germane" to that governmental interest.

In this case, the University of Wisconsin compels students to pay a student fee, part of which is used to support private speech to which the respondent students object. The student fee system at issue violates the First Amendment because the University has not demonstrated the existence of an important governmental interest that can be advanced only by compelling students to fund private speech. In fact, were the University of Wisconsin to abolish compelled fees, the marketplace of ideas not only would survive, it would flourish. The vast majority of the student groups at the University "speak" and engage in other activities without using any mandatory student fees, much less fees that have been extracted from students who object to some or all of the speech their fees are used to support. Moreover, other universities have established successful marketplaces of ideas by using student fee systems that do not compel dissenting students to finance the private speech of others.

Because the University fails to show an important governmental interest to which the compelled funding of private speech is necessary, the Court need not even reach the second question in the analysis – that is, whether the funded speech to which the students in this case object is "germane" to the identified important governmental interest. The University and its *amici* simply apply the wrong analysis when they argue that the University may compel students to fund private speech, including private speech with which they disagree, as long as the activities and/or speech are "germane" to the University's virtually limitless definition of its own educational mission. Thus, the University incorrectly attempts to collapse the Court's two-part test into one question, and the wrong question at that.

The University and its supporting *amici* also misconstrue *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), when they argue that the limited public forum analysis in that case already resolved the question presented here, and resolved it in favor of the University. The *Rosenberger* Court did not decide whether or how a public university may force students to finance either private speech with which the students disagree, or a limited public forum that funds such speech. In fact, and as the other precedents of this Court make clear, a public university cannot compel students to finance private speech, including speech with which they disagree, in the absence of an important governmental interest that can be advanced only by compelling students to fund private speech. Certainly the University has demonstrated the existence of no such interest in this case. The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

ARGUMENT

I. THE STUDENT FEE SYSTEM AT ISSUE VIOLATES THE FIRST AMENDMENT BECAUSE THE UNIVERSITY HAS NOT DEMONSTRATED AN IMPORTANT GOVERNMENTAL INTEREST THAT CAN BE ACCOMPLISHED ONLY BY COMPELLING FUNDING OF PRIVATE SPEECH.

The University of Wisconsin compels students to pay a student fee, part of which is distributed to student groups engaging in political and ideological speech. *See Pet. Br.* at 4. Payment of the fee is mandatory because if a student refuses to pay it, the University will withhold the student's grades and will not allow the student to graduate. *See Answer* ¶ 9. The speech in which the various groups engage, and that is at issue in this case, is "private" speech because, as the record makes clear, the student groups are not funded with tuition, and the University specifically disassociates itself from the speech and activities of these organizations. *See* JA-34, 41 (stating that groups must use disclaimers).

A. The University Has Not Demonstrated the Existence Of An Important Governmental Interest That Can Be Accomplished Only By Compelling Support of Private Speech.

The First Amendment prohibits the government from compelling a person to speak or to financially support private speech.[2] If the University is permissibly to compel

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[2] As will be explained *infra* at 18-22, this case presents no question concerning whether or how a public university or other governmental entity can assess tuition or taxes, or the uses (including the funding of speech) to which such assessments may be put. Thus, this

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students to finance the private speech of others, notwithstanding the general First Amendment prohibition on governmental compulsion of private speech, the University must prove two things. First, it must demonstrate the existence of an "important government interest" that can be advanced only by compelling students to fund private speech. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225 (1977) (finding that "important government interests" justified agency shop); *Lathrop v. Donohue*, 367 U.S. 820, 833 (1961). Second, even if the University satisfies this first prong of the analysis, it also must demonstrate that the private speech to which the plaintiffs object is "germane" to the identified important governmental interest. *See Abood*, 431 U.S. at 235-36 (considering whether advancement of ideological cause is germane to purpose of collective bargaining); *Keller*, 496 U.S. at 14 (asking "whether the challenged expenditures are necessarily or reasonably incurred for the purpose" which justified compelled support).[3] Because the University has not acknowledged,

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case concerns only *private* speech and the compelled funding thereof; it does not concern any restrictions on or constitutional questions with respect to the University's own speech or its "academic freedom."

[3] All of the United States Courts of Appeals that have considered compelled funding of private speech in the University context have recognized that First Amendment values are at stake, and have looked to *Abood* and *Keller* for guidance. *See Carroll v. Blinken*, 957 F.2d 991, 996 (2d Cir.) ("*Abood* . . . and its progeny . . . [are] most relevant to the case at hand."), *cert. denied*, 506 U.S. 906 (1992); *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985) (finding *Abood* relevant in university context despite differences from union), *cert. denied*, 475 U.S. 1065 (1986); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) (looking to *Abood* and finding requirement of vital policy interest when government compels individual to subsidize non-governmental speech); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, (Continued...)

much less satisfied, the first prong of the analysis, it has failed to demonstrate the constitutionality of compelling students to pay a fee that funds the private speech of others.

The University and its *amici* ignore the first question before the Court, *i.e.*, whether the University has articulated an important governmental interest that can be accomplished only by compelling students to support the private speech of others. Instead, they turn the correct analysis on its head, and argue that students may be compelled to financially support the private speech of others if the speech is "germane" to a generalized interest in education. *Pet. Br.* at 37-47. Because the University asks and answers the wrong question, it fails to satisfy its burden in demonstrating the constitutionality of its student fee system and of its attempt to compel students to fund the private speech of others.

In *Abood*, the Court began its analysis by addressing "whether an agency-shop provision in a collective-bargaining agreement covering governmental employees is, as such, constitutionally valid." *Abood*, 431 U.S. at 216. It analyzed this issue *before* it reached the question of whether the particular expenditures to which the employees in that case objected were "germane" to the identified important governmental interest. Only after the Court had agreed that "important government interests" could be accomplished only through mandatory collection of the fees at issue, did the Court proceed to address whether the particular objected-

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1036-40 (9th Cir. 1998) (finding that "the principles of *Abood* and *Keller* remain applicable"); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983) (comparing case at issue to *Abood*); *see also Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 506 (Cal.) (analyzing case using *Abood* and its progeny), *cert. denied*, 510 U.S. 863 (1993).

to speech was "germane" to the articulated important governmental interest. *Id.* at 225, 232-36.

This first question – *i.e.*, whether the University has articulated an important governmental interest that can be accomplished only by compelling students to fund the private speech of others – is also addressed in other relevant cases. *See, e.g.*, *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956) (finding important government interest justifying use of closed shop); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 746-50 (1961) (summarizing *Hanson*). As the Court recognized in *Abood*, the governmental interest in "peaceful labor relations" and in preventing "free riders" justified the mandatory collection of dues to support the union's collective bargaining function. *Abood*, 431 U.S. at 219, 222. Thus, because nonpaying nonmembers could receive tangible benefits such as wage increases through the collective bargaining system and could receive services such as representation in a grievance proceeding, as mandated by the collective bargaining agreement, the important governmental interest could be advanced only through the mandatory payment of dues or fees to the union. This interest justified the compelled support of private speech.

Similarly, although the University and its supporting *amici* extensively cite this Court's decision in *Keller*, they fail to recognize that *Keller* addressed only the second prong in the Court's two-step analysis – *i.e.*, whether particular speech to which the plaintiffs objected was "germane" to the governmental purpose justifying the mandatory payment of bar dues. The first question in the analysis – whether the mandatory payment of bar dues was permissible in the first place – had been answered in the affirmative in *Lathrop v.*

Donohue. The analytical step taken by the Court in *Lathrop* is missing from the University's argument.

In *Lathrop*, the Court extensively analyzed the public interest objectives promoted by the "compelled financial support" required of lawyers as a result of the integration of the bar. *Lathrop*, 367 U.S. at 828-30. The Court held that the state constitutionally could compel the payment of dues to advance the "legitimate end of state policy" of, among other things, "elevating the educational and ethical standards of the Bar." *Id.* at 828, 843. Only in light of this holding in *Lathrop* did the Court have occasion to address whether particular objected-to speech being funded by compelled dues was "germane" to the important governmental purpose justifying the compelled payment of bar dues. *See Keller*, 496 U.S. at 98 (noting that although the *Lathrop* Court allowed the integration of the state bar, it reserved questions concerning the use of dues to support political activities).

The University has ignored, and thus failed to meet, its burden of demonstrating the existence of an important government interest to which the compelled support of private speech is necessary. The University asserts a broad educational interest, *see Pet. Br.* at 36, but it does so only for the purpose of arguing that the compelled student fee is "germane" to this educational purpose. This is not even the appropriate analysis for the second prong of the Court's test, and it certainly has nothing at all to do with the first – *i.e.*, whether the University has articulated an important governmental interest that can be served only by compelling students to financially support private speech.[4]

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[4] Whether the students dissent or object to the particular private speech the University seeks to compel is irrelevant to this first prong of

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B. The Empirical Evidence Does Not Support The Contention That Compelled Support of Private Speech Is Necessary To Advance The University's Asserted Educational Mission.

Instead of proving the existence of an important governmental interest which can be accomplished only by compelling the financial support of private speech, the University argues that the compelled support of private speech is "germane" to the University's educational mission. *See Pet. Br.* at 37-47. The Court need not address that question in this case because the University has not shown that compelled support of private speech is necessary to achieve an important governmental interest.[5]

Nevertheless, to the extent that the University attempts to argue that its broad educational mission and its promotion of a marketplace of ideas are important

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the compelled speech analysis. Notably, and correctly, the question on which the Court granted review in this case does not even mention whether or not the students dissent from the speech which the University compels them to support. Of course, only students who object to the speech they must fund are likely to challenge the compulsion of their support, but whether and why the students dissent is not relevant to whether they have proved a First Amendment violation.

[5] To demonstrate the existence of an important governmental interest which can be accomplished only by compelling students to fund private speech with which they disagree, the University must make a concrete showing of that interest and of the necessity for compelled funding. In the First Amendment realm, "mere speculation or conjecture" does not satisfy the government's burden. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *see also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, n.22 (1984).

governmental interests that it can accomplish only by compelling students to support the private speech of others, the University's argument must fail. Nothing in this record supports such an assertion. In fact, the record supports precisely the opposite conclusion.[6]

1. The Marketplace Of Ideas At The University Of Wisconsin Will Not Suffer In The Absence Of Compelled Support Of Private Speech.

Far from adversely affecting the number or variety of student groups or the marketplace of ideas, the absence of compelled student support of private speech would have little or no impact on the marketplace of ideas or even on the particular student groups that currently receive student fee funds.[7] The vast majority of the University of Wisconsin's

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[6] WLF and CFACT assume, for the purposes of this brief, that the University's purported educational mission and interest in promoting a marketplace of ideas constitute "important government interests." However, limits exist on the government's ability to decree "important government interests." The University cites *Regents of University of California v. Bakke*, 438 U.S. 265, 312 (1978), for the proposition that universities have a very important educational mission. *See Pet. Br.* at 24. But the Supreme Court in *Bakke* struck down the University of California's affirmative action program, finding that the means by which the University sought to attain its goals violated the Constitution. The Court need not determine, in this case, what limits there may be on a public university's ability to articulate "important government interests" to justify compelled support of private speech. Here, even assuming that the University has articulated such interests, it has failed to demonstrate that those interests can be advanced only by compelling the financial support of private speech.

[7] Nonexpressive issues are not at issue in this case, and therefore the Court need not address the circumstances under which students may be compelled to pay a fee that supports nonexpressive activities or
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student groups do not request or receive funding from the mandatory fee: approximately 500 of the 600 on-campus groups exist independently of the mandatory student fee at issue here. *Compare* stip. ¶ 25 *with* JA-255-99. In fact, "the primary sources of funding for most student organizations are membership dues and other fundraising ideas." JA-300. Moreover, as shown below, other universities with a similar interest in robust debate succeed in fostering that debate without requiring students to fund private speech with which they disagree. *See infra* Part I.B.2.

A closer look at the student groups that obtain money from the mandatory student fees at the University of Wisconsin reveals that the fees are rarely the sole, or even the primary, source of funding for those groups. For example, the Ten Percent Society has played a very visible role in this litigation; according to its own records, the segregated fee funding comprises less than five percent of its funding. JA-208 ("Although the Ten Percent Society

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expenditures. A large part of the student fee funding at the University of Wisconsin and at other universities and colleges goes to support nonexpressive activities. For example, at the University of Wisconsin, approximately eighty percent of the funding is "nonallocable" and flows to items such as debt service, fixed operating costs of auxiliary operations, required reserves, the Wisconsin Student Union, the first and second year of the recreational sports budget, and other University Health Services. *Pet. Br.* at 7; Stip. ¶ 7. In 1994, the College of William and Mary applied all of the $660 student fee to support the athletic program. Meabon, *et al.*, *Financing Campus Activities* (National Ass'n for Campus Activities Educational Found. 1996) at 9-10. Other universities and colleges use the funds for financial aid, health services, career services, computer and technology services, athletics, the student union, and recreation centers. *Id.* at 10. Those expenditures, and the assessment of student fees to fund them, are not at issue in this case.

received an ASM grant of $550 in 1995-96, its budgeted income for the year *from other sources* . . . totaled $13,000." (emphasis added)). Thus, even if the Ten Percent Society and other ASM-funded groups were to receive no ASM funds, the University has not demonstrated (nor is it reasonable to assume) that they would cease to exist or that they would not be able to engage in most or all of their current expressive activities.

2. Other Colleges And Universities Foster Debate Without Forcing Students To Fund Private Speech.

Universities across the nation, many of them public universities, use a wide variety of student fee systems to promote the same general goals as the University of Wisconsin. However, in contrast to the University of Wisconsin's system, several of these options avoid forcing any students to financially support private speech, much less private speech with which they disagree. Such options include a "positive check-off system," a "negative check-off-system," a "refundable fee," and funding only for activities that are "on curriculum."

For example, schools such as the University of Washington and the University of California at Berkeley use a "positive check-off" or "pledge" system. *See* Tozloski, *CFACT Survey on State PIRGs and Their Funding* (unpublished study) (1998). In such a system, each student receives a list of groups that are eligible for funding from the student fee. The individual students then check off which of those groups will receive a portion of their student fee. Each student must pay the student fee, but freely decides which groups he or she will fund through that payment.

Under the "negative check-off" system, all groups are eligible to receive a portion of the student's fee unless the student manifests an objection to funding a specific organization. The student can object by "checking off" certain groups whose speech or activities he or she does not wish to fund, either because of an objection to the speech of a particular group or because of any other reason. Thus, the default in this system is that all groups are eligible to receive a part of the student fee. Several of the University of Minnesota and University of Massachusetts schools, the University of Connecticut, and Rutgers University use such a negative check-off system. *See id.*

Under a third option – the mandatory, refundable fee – the student actually can receive a refund of the portion of his or her fee that otherwise would flow to speech or activities that the student does not wish to fund. Trinity College in Connecticut and the College of Staten Island, New York have implemented such a system. *See id.*

Finally, of course, if a university decides that a certain activity or certain speech is necessary to achieving its educational mission, and funding for it should not be left to the vagaries of individual students' choices about whether to fund the particular private speech or activities at issue, the University can attempt to bring that activity or speech "on curriculum" and can fund it with tuition money. For example, at Cornell University, *The Cornell Daily Sun* receives no funds through the university and is completely independent of the University's administration.[8] On the other hand, Cornell's journalism classes are part of the

[8] *The Beginning of the Sun* (updated Mar. 11, 1999) <http://www.cornellsun.com/aboutus.shtml>.

curriculum funded by the university's tuition payments. Should the University decide to bring an activity on curriculum, of course, the constitutional restrictions on a public university's speech and activities would apply, but those questions are not presented in this case.

The Court need not establish in this case the precise universe of constitutional student funding mechanisms for private speech on university campuses, and for that matter, WLF and CFACT do not admit that some or all of the alternative funding mechanisms described here are constitutionally permissible. The important point for present purposes, however, is that a variety of systems may satisfy the requirements of the Constitution. *Cf. Keller*, 496 U.S. at 17 (remanding for determination of constitutional system); *Abood*, 431 U.S. at 235-36 ("the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment"). The above alternatives merely demonstrate the wholesale inability of the University to show that it is necessary to the accomplishment of any important governmental interest, certainly any interest that the University has articulated, for students to be compelled to financially support other people's private speech.

3. No "Free-Rider" Problem Justifies The Mandatory Payment Of Fees That Are Used To Fund Private Speech.

In several previous compelled speech cases, the governmental interest in preventing "free-riders" formed a large part of the justification for allowing the compelled

association or private speech at issue. Thus, the Court has noted:

> A union shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Abood, 431 U.S. at 221-22; *see also Street*, 367 U.S. at 776 (Douglas, J., concurring) ("[The] beneficiaries are all the members of the laboring force, . . . [therefore] it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost."); *Keller*, 496 U.S. at 12 (stating that all lawyers benefit from being admitted to bar and therefore should share certain costs).

In the instant case, the University has pointed to no similar "free-rider" problem that justifies compelling students to support the private speech of others. Indeed, there is no such "free-rider" problem. No evidence indicates that the University's educational mission and its marketplace of ideas would suffer in the absence of compelled student support of others' private speech. *See supra* Part I.B.1, 2. Moreover, dissenting students receive no clear tangible benefit from having their mandatory student fees used to support speech with which they disagree that is in any way comparable to the benefit created by a collective bargaining mandate or by the smooth administration of an integrated state bar.

"[T]he educational benefit to a few students [who are active in political speech] cannot justify the burden on all students' free speech and associational rights." *Smith*, 844 P.2d at 516. Thus, this case is different from *Abood* and *Hanson*, wherein employees received substantial benefits from union representation even if they refused to join the union. *See Abood*, 431 U.S. at 219 (citing *Hanson*, 351 U.S. at 238). By contrast, a student receives no such tangible benefit from being forced to support speech to which he objects. The University trumpets the values of tolerance as a part of the educational mission, and even seems to argue that students can be forced to fund speech to which they object because they will benefit from hearing that speech. *Pet Br.* at 42 ("Exposure to diverse and competing views is educational in and of itself and teaches tolerance.") However, such an argument must fail. Surely the First Amendment prohibits, for example, the government from compelling a Jewish student to provide funds for a group that has as its express purpose proselytizing and converting Jews to Christianity,[9] even if the University believes it would do that student good to be exposed to such views.[10]

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[9] As the Supreme Court of California noted, "Students are, in fact, forced to support causes they strongly oppose... [A] group which espoused the supremacy of a particular race would be eligible to receive mandatory fees so long as it permitted all students to join without discrimination." *Smith*, 844 P.2d at 512.

[10] As this Court has noted, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). *Cf. Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) ("The premise of our Bill of Rights, however, is that there are some things – even some seemingly desirable things – that government cannot be trusted to do. The very first of these is establishing the restrictions

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The University argues that because the funds support many viewpoints, compelling support for private speech does not violate the Constitution. *See Pet. Br.* at 23. However, forcing students to fund many groups "in no way heals the constitutional infirmity," *Carroll v. Blinken*, 957 F.2d 991, 998 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992). Rather, it "compound[s the evil]," *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).

C. Student Fees Are Distinguishable Both From Taxes And From Tuition.

The constitutional questions concerning mandatory student fees that are presented in this case are distinct from any issues that might be raised with respect to the collection or expenditure of taxes or tuition (whether for speech or any other use). The University argues that the cases giving the government broad discretion in the use of taxes justify broad discretion in how the University (and/or the student government) spends compelled student fees. *See Pet. Br.* at 35. However, both the majority opinion and Justice O'Connor's concurrence in *Rosenberger* pointed out the difference between taxes and student fees. The majority stated that a mandatory student fee is "not a general tax designed to raise revenue for the University." *Rosenberger*, 515 U.S. at 841. Justice O'Connor clarified that student fees are "not government resources . . . but a fund that simply belongs to the students." *Id.* at 851-52 (O'Connor, J., concurring). Therefore, the University's attempt to use tax cases to support its argument is unpersuasive. *See Pet. Br.* at

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upon speech that will assure 'fair' political debate.").

35 (citing *Lull v. C.I.R.*, 602 F.2d 1166 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970)).

Sound pragmatic reasons justify the different constitutional treatment accorded to mandatory student fees as opposed to taxes. The tax system encompasses millions of individuals, as compared to the much smaller University of Wisconsin student body.[11] This Court justifiably has been greatly concerned with the threat of administrative burden created by an opt-out from the tax system.[12] However, and despite the University's assertions to the contrary, *Pet. Br.* at 45, it is implausible to assume that the University – an institution responsible for millions of dollars in government financial aid – would be incapable of administering a simple check-off system for any student fees it wishes to assess.[13] Indeed, as explained above, many universities have successfully implemented such systems. At most, the

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[11] *Cf. Keller*, 496 U.S. at 11 (observing that integrated bar funding "comes not from appropriations made to it by the legislature, but from dues levied on its members by the Board of Governors").

[12] *See, e.g., United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); *Autenrieth v. Cullen*, 418 F.2d 586, 588-89 (9th Cir. 1969) ("If every citizen could refuse to pay all or part of his taxes because he disapproved of the government's use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed."), *cert. denied*, 397 U.S. 1036 (1970).

[13] In fact, "[ASM requests] are subject to the same Business Services pre-audit scrutiny as all other expenditures of University funds." JA-156. Because auditing requirements already exist, a different system would not produce significant additional burdens on University groups.

burden on the University would resemble that in *Keller*: "While such [an opt-out or pro rata refund] would likely result in some additional administrative burden to the [University] and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate." *Keller*, 496 U.S. at 16-17 (citation omitted).

Moreover, the type of injury alleged by the respondents is different in gravity and in kind from the type of injury that might be alleged by a taxpayer objecting to a particular use by the government of the taxpayer's taxes. Because of the vastly larger number of taxpayers that exist in many governmental units than there are students at the University of Wisconsin (not to mention respondents in this case), and because of the vastly larger number and variety of government expenditures than there are groups receiving student fee funds at the University, the respondents have suffered cognizable injury from the expenditure of their student fee funds, even though a dissenting taxpayer could not necessarily establish such injury. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 477, 480 (1982).

Both the University and its supporting *amici* argue at length that because academic freedom is very important, and because the University has a large amount of discretion in the use of tuition money, the Court similarly should find that the University has broad discretion in deciding how to spend mandatory student fees. *See Pet. Br.* at 24-25. The analogy to tuition is unpersuasive; student fees are distinct from tuition in several ways.

First, tuition funds the University's speech, not that of individual students acting as private speakers. *Compare*

Rosenberger, 515 U.S. at 851-52 (O'Connor, J., concurring) (stating that student fees are for use by students) *with id.* at 833 ("When the University determines the content of the education it provides, it is the University speaking. . ."). The government has greater control over speech that it adopts as its own than over speech by private actors. *See, e.g., NEA v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 2179 (1998); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *United States v. Lee*, 455 U.S. 252, 260 (1982) (taxpayer cannot object to use of taxes). Conversely, the contributor has greater control over *private* speech funded by compelled fees than over *governmental* speech funded by taxes or by tuition. *See, e.g., Rosenberger*, 515 U.S. at 851-52 (O'Connor, J., concurring) (distinguishing student fees from taxes). In this case, the University expressly states that the speech at issue is not its own; therefore, as noted above, this case involves forced funding of private speech. *See Pet. Br.* at 30.

Second, tuition at a University constitutes a transfer from a private individual to the University. The mandatory fee represents a transfer from a private individual for the benefit of another private individual or group. For example, the individual who travels courtesy of an ASM travel grant benefits directly from the transfer of funds from a private individual. Thus, this case involves the transfer of money from students to private individuals or groups. The University has determined that the tuition and mandatory fee are distinct, and it cannot now be allowed to argue that they are in fact the same thing.

In any event, the respondents do not challenge the use of tuition. *See Pet. Br.* at 45 (stating that respondent would challenged certain speech if funded by student fees but not if funded by tuition (citing Southworth Dep. at 23-24, R. 23)).

Therefore, this case presents no issue as to the constitutionally permissible uses of tuition.

II. THE STUDENTS NEED NOT SATISFY THE VARIOUS BURDENS THAT THE UNIVERSITY SEEKS TO PLACE ON THEM.

A. The Dissenting Students Need Not Show That They Have Been Mistakenly Identified With The Speech To Which They Object.

The Supreme Court has recognized two distinct First Amendment violations in connection with compelled speech. The first concerns *forced association or identification* with a cause to which the individual objects. The second concerns *compelled financial support* of expressive activities to which the individual objects. *See Southworth v. Grebe*, 151 F.3d 717, 719 (7th Cir. 1998), *reh'g denied, cert. granted sub. nom. Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 119 S. Ct. 1332 (1999) (recognizing two different corollaries to First Amendment). The University fails to distinguish between these two potential violations; the University's assertion that it does not require the students "either to speak or to become members of any group," *see Pet. Br.* at 25, is relevant only to the first potential violation (forced association or identification).

First, the Constitution prohibits the government from forcing individuals to associate with or be identified with causes with which they disagree. *See Wooley v. Maynard*, 403 U.S. 705 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). To establish a violation of this principle, a plaintiff need not show that she has been forced to provide financial support to objectionable causes; instead,

she must demonstrate a danger that she is being identified with the expressive activity with which she disagrees.

Second, the First Amendment protects individuals from being forced to provide financial support for the expressive activities of other private parties. *See, e.g.*, *Abood*, 431 U.S. 209; *Keller*, 496 U.S. 1. Courts in compelled-financial-support cases have not required plaintiffs to demonstrate that third parties associate dissenting plaintiffs with the cause being funded. *See Abood*, 431 U.S. at 211-12 ("[E]very employee represented by a union even though not a union member must pay to the union, as a condition of employment, a service fee equal in amount to union dues. . . . Nothing . . . however, required any [employee] to join the Union, espouse the cause of unionism, or participate in any other way in Union affairs."); *Lathrop*, 367 U.S. at 828 ("We therefore are confronted, as we were in [*Hanson*], only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." (citation omitted)).

Instead, simply forcing a dissenting individual financially support the private speech of others infringes on First Amendment rights. The Court repeatedly has justified this constitutional rule by quoting Thomas Jefferson: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Nothing in this statement or in the Court's First Amendment jurisprudence suggests that compelled financial support is acceptable as long as the person being compelled to provide the financial support is not publicly identified with the private speech being supported. As a result, it is irrelevant for purposes of this case whether an objective observer might think that the respondents support the goals of the Ten Percent Society.

The University also asserts that the opportunity for the students to offer a disclaimer saves the financing system from a compelled speech challenge. Stip. ¶ 72; JA-34, 41 (stating the groups must include disclaimer that its view are not those of ASM); *Pet. Br.* at 15 (explaining that the University requires groups to attach disclaimer that speech is not on behalf of students). But a disclaimer does not answer respondents' objections. A disclaimer does not change the fact that the respondents are being forced to finance the private speech of others, including speech to which they object, and that the University has not demonstrated the existence of an important government interest the accomplishment of which requires the compelling of such support for private speech.

B. The Prohibition On Financing Speech With Compelled Fees Extends Beyond Political And Ideological Speech That A Person Opposes.

Any compelled contribution to a private organization's expressive activities implicates the First Amendment. "[T]he First Amendment fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious, or any other." *Street*, 367 U.S. at 791 (Black, J., dissenting).

To prevail in this case, the students need not demonstrate that the speech to which they object is "political" or "ideological." Although the question on which the Court granted review was limited to compelled funding of "political" speech, no constitutional rule limits the student's First Amendment right not to be compelled to fund

private speech only to the compelled funding of "political" or "ideological" speech. Indeed, as this Court has stated:

> [O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters – to take a nonexhaustive list of labels – is not entitled to full First Amendment protection. . . . Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

Abood, 431 U.S. at 231-32 (citations omitted).

C. *Rosenberger* Addressed Eligibility To Participate In A Limited Public Forum, Not Who Must Fund The Forum.

As the University admits, this case presents "the question reserved in *Rosenberger*." *Pet. Br.* at 26. Yet, as noted above, the University argues, in essence, that the "limited public forum" discussion in *Rosenberger* already decided the instant case. *Pet. Br.* at 36.

The University is mistaken. *Rosenberger* only addressed to whom the University must grant access once a limited public forum has been established. The question in this case is who the government can force to fund private speech or a limited public forum that finances private speech, and what rights individuals may have when the government seeks to force them to do so.

As the *Rosenberger* majority stated: "The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe." *Rosenberger*, 515 U.S. at 840. Justice O'Connor was even more explicit, stating: "although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees." *Id.* at 851 (O'Connor, J., concurring). In fact, after acknowledging the reserved question, both the majority and Justice O'Connor reference *Keller* and *Abood*, indicating that the compelled speech cases govern the question of mandatory student funding of private speech to which students object. *Id.* at 840; *id.* at 851 (O'Connor, J. concurring). The University improperly discounts the *Rosenberger* Court's guidance on the proper analysis for this question.

Allegedly following *Rosenberger*, the University cites several cases addressing public fora in support of its position, but each is distinguishable from the instant case. *See, e.g.*, *Pet.-Br.* at 31. Two of the key precedents on which it relies revolve around access to physical facilities that the Court deemed limited public fora. *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). *Rosenberger* addressed the same access question with respect to a nonspatial forum. None of these three cases, however, addressed appropriate funding mechanisms for the public fora, much less whether individuals could be compelled to pay for a privately-controlled limited public forum. In fact, when the Court has considered cases treating forced subsidization of a forum, it has found constitutional violations. *See, e.g.*, *Turner*

Broadcasting System, Inc. v. F.C.C., 512 U.S. 646 (1994) (striking down "must-carry" provisions); *Pacific Gas & Elec.*, 475 U.S. 1 (striking down state law requiring objecting company to distribute consumer group's information); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down right of reply in a newspaper). *Cf. Buckley*, 424 U.S. at 91 (emphasizing voluntary nature of public financing of presidential elections).[14]

D. Laundering Money Through The Associated Students Of Madison Does Not Erase What Is Otherwise A First Amendment Violation.

The University cannot avoid the First Amendment by creating an additional layer in the administrative scheme through which mandatory student fees are distributed and by which private speech is funded. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 512-13, 520. Just as "no one doubts that [the organizations at issue here] 'speak[]' for First Amendment purposes," *see Carroll*, 957 F.2d at 997, it is equally clear that the students are funding that speech with their compelled student fees. "That this slice of the student activity fee is briefly in the hands of the [ASM] while being funneled from students to [WISPIRG and other groups] does not diminish the fact that a transfer has taken place." *Id.* If

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[14] The University points to a sole exception to the constitutional prohibition on government forcing private individuals to provide a forum: *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Pet. Br.* at 33-35. As that Court noted, however, "[m]ost important, the shopping center by choice of its owner is not limited to the personal use of appellants." *PruneYard*, 447 U.S. at 87. In addition, the Court in that case found a traditional public forum, not a limited public forum. *Id.* Finally, the Court found that individuals had no alternative location for expression, while in this case, student groups have alternative means of funding. *Id.*

this were not so, any compelled speech violation of the First Amendment likely could be cured simply by the creation of an intermediary through which the compelled funds passed before being handed to the actual speaker or student group.

Nor does the University avoid a First Amendment violation by compelling funds based on a student referendum. By definition, the Bill of Rights is counter-majoritarian. A majority vote cannot circumvent it. As the Seventh Circuit stated in the decision below, "The First Amendment trumps the democratic process and protects the individual's rights even when a majority of citizens wants to infringe upon them." *Southworth*, 151 F.3d at 732.

CONCLUSION

It is not constitutionally permissible for the government to force students at a public university to fund private speech, including private speech with which they disagree. For all of the reasons stated above, the judgment

of the U.S. Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted.

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 588-0302

DANIEL E. TROY
Counsel of Record
DAVID R. HILL
WILEY, REIN & FIELDING
1776 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 719-7000

AUGUST 13, 1999

Counsel for Amici Curiae*

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* Counsel gratefully acknowledge the assistance of Elisebeth Collins, a third-year student at Harvard Law School, and Rebecca Rees, a third-year student at Washington and Lee School of Law, in the preparation of this brief.

(31)

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No. 98-1189

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

Board of Regents, University of Wisconsin,
Petitioner,

v.

Scott Southworth, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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AMICUS CURIAE BRIEF OF OWEN BRENNAN ROUNDS; H.E. FRIEDERICH VON CARP; HARRISON LYNCH; ED MATTHEWS; AND STUDENTS FOR LEGAL GOVERNMENT IN SUPPORT OF RESPONDENTS

THOMAS H. NELSON
Thomas H. Nelson & Associates
825 NE Multnomah Suite 925
Portland, Oregon 97232
Telephone: (503) 230-8311
Counsel for Amici Curiae

August 9, 1999

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Rules

U.S. Supreme Court Rule 37 1

IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Owen Brennan Rounds, H.E. Friederich Von Carp, Harrison Lynch, Ed Matthews, and Students for Legal Government respectfully submit this brief amicus curiae in support of Respondents Scott Southworth, *et al.* All parties consented to the filing of this brief. The letters of consent have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Owen Brennan Rounds, H.E. Friederich Von Carp, Harrison Lynch, and Ed Matthews were students at the University of Oregon in Eugene, Oregon. They objected to paying a mandatory fee to subsidize the Oregon Student Public Interest Group Educational Fund ("OSPIRG EF"). In a decision issued February 23, 1999, the Court of Appeals for the Ninth Circuit rejected their First Amendment claims against the Oregon State Board of Higher Education, the University of Oregon, OSPIRG EF, and a number of state and university officials. *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (9th Cir. 1999), *pet. for reh'g pending decision in Southworth granted* (*Rounds*, 9th Cir. 1999).

In its *Rounds* decision, the Ninth Circuit found that First Amendment claims in the student activity fee context warrant only intermediate scrutiny. *Id* at 1037. The Ninth Circuit also found that OSPIRG EF engages only in "educational," not "political," activities, *Id.* at 1038, and that support of OSPIRG EF's activities with mandatory student fees does not offend the First Amendment. *Id.* at 1040. The *Rounds* students filed a petition for rehearing which the Ninth Circuit has deferred pending resolution of *Board of Regents v. Southworth*.

SUMMARY OF ARGUMENT

Amici support the determination by the court below that the First Amendment prohibits the compelled funding of private student groups' political and ideological activities. Even if, however, the Court determines that some such compelled funding can survive constitutional scrutiny, Amici submit that such funding of political activity is unconstitutional when (i) the targets of the funded group are not students *qua* students but, rather, federal and state political leaders and the population at large, and (ii) the funded group spends the greater part of the funds derived from mandatory fees at locations geographically far removed from the campus of origin.

ARGUMENT

Introduction

The First Amendment protects a person's right *not* to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("*Roberts*") ("Freedom of association . . . plainly presupposes a freedom not to associate"). This right is infringed upon when a person is compelled to subsidize the expressive activities of another. *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977) ("*Abood*") ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."). Compelled funding must be "carefully tailored" to minimize this infringement. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986) (citing *Roberts*, 468 U.S. at 623 (1984) for the proposition that "[i]nfringements on freedom of association 'may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'").

The constitutionality of compelled funding has arisen in two relatively narrow contexts, agency-shop cases and integrated-bar cases. *Abood*, 431 U.S. 209 (1977); *Keller v. State*

Bar of California, 496 U.S. 1 (1990) ("*Keller*"). This Court has not addressed compelled funding in the educational context. In the agency-shop and integrated-bar contexts, however, this Court has held that compelled funding does not violate the First Amendment provided that the subsidized activity is *germane* to the government interest that justifies the exaction. *Abood*, 431 U.S. at 235-36; *Keller*, 496 U.S. at 13-14.

In the context of agency-shop cases, compelled funding that is germane to collective bargaining is carefully tailored to minimize infringement on First Amendment rights by application of three factors. First, the purpose behind the agency-shop laws, labor peace through collective bargaining, is a legitimate government purpose. Second, in the face of the free-rider problem discussed *infra*, compelled funding is the most narrowly tailored manner in which the government can achieve this purpose. Third, the government's purpose, collective bargaining, is relatively narrow and requiring subsidized activities to be germane thereto ensures that compelled speech is as narrowly drawn as possible.

These same three factors apply in the context of integrated-bar cases. First, the purpose behind integrated-bar laws, regulation of the legal profession and the improvement of the

legal system, is a legitimate government purpose. Second, again because of the free-rider problem, compelled funding is the most narrowly tailored manner in which the government can ensure these purposes. Third, the government's interest, regulation of the legal profession and improvement of the legal system, is relatively narrow and requiring that subsidized activities be germane thereto ensures that compelled speech be as narrowly drawn as possible.

In the agency-shop and integrated-bar contexts, the government's purposes are legitimate and the free-rider problem mandates compelled funding. Accordingly, the only factor left to assess is whether the subsidized activities are *germane* to the applicable governmental purpose. Moreover, because these purposes are relatively narrow, the germaneness inquiry assures that compelled funding is as narrowly drawn as possible and therefore constitutional.

The mandatory-student-fee context presents a more difficult problem. The purpose behind compelled funding, education, is obviously a legitimate governmental interest, but it ~~is by~~ no means clear that there is a free-rider problem. In the absence of a free-rider problem, the government's educational mission may be pursued without compelled funding, and which would eliminate impositions on associational freedoms.

Amici suggest that this Court consider whether there is a sufficient concern with free-riders in the compelled student fee context to justify mandatory exactions. In the absence of such a concern, the objecting students should not be required to fund voluntary third-party activities. If compelled funding is found to be justified, Amici suggest that simple germaneness to education is not of itself sufficient to establish that the compelled speech is as narrowly drawn as possible, and that the government's interest in education should be pursued in ways that are significantly less restrictive of associational freedoms than the compelled funding of political and ideological activities. Finally, even if compelled funding of political activities is found to be justified in the educational context, Amici respectfully request that the Court provide guidance to the effect that such funding is not warranted if the funded entity (i) targets off-campus political leaders and the general population (ii) from locations geographically far removed from the campus that is the source of the funds.

The Free-Rider Problem

Mandatory funding is necessary in the agency-shop and integrated-bar contexts because of the free-rider problem. *Abood*, 431 U.S. at 224; *Keller*, 496 U.S. at 12; *Lehnert v. Ferris*

Faculty Association, 500 U.S. 507, 520-21 (1991) ("*Lehnert*"). The free-rider problem arises because non-union employees and collective bargaining representatives share a common cause. *Abood*, 431 U.S. at 222-23 (citing with approval Justice Douglas' concurrence in *International Association of Machinists v. Street*, 367 U.S. 740, 778 (1961) ("*Machinists*"), in which Justice Douglas wrote, "[t]he furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy". Non-union employees directly benefit from a collective bargaining representative's ability to negotiate favorable terms of employment; if non-union employees were allowed not to fund the efforts of collective bargaining representatives, they would receive the benefits of union negotiation without bearing the costs. This free-rider problem can *only* be mitigated by requiring non-union employees to fund the collective bargaining related activities of collective bargaining representatives. Because of the free-rider problem, the governmental interest of labor peace cannot be pursued through collective bargaining without compelling non-union employees to fund the activities of collective bargaining representatives. The same free-rider problem applies, though less

directly, in the integrated-bar context. *Keller,* 496 U.S. at 12.

It is not clear, however, that this free-rider problem applies in the educational context. In the instant case, the government has compelled students to fund the expressive activities of voluntary student groups and justified such compelled funding on the basis of its interest in education. In the educational context, however, the free-rider problem is more attenuated; any educational benefits that a student group might provide do not directly benefit students who oppose the funding of such a group. For example, a conservative student derives no direct educational benefit from the expressive activities of a student socialist group; the conservative student is opposed to the expressive activities of such a group and will not willingly participate in those activities. Because the conservative student receives no direct educational benefit from the socialist group's expressive activities, the conservative student will not become a free-rider by failing to fund the socialist group.

It might be argued that the mere existence of the socialist group provides some indirect educational benefit to the conservative student. Any such benefit, however, is a far cry from the direct benefits that create the free-rider problem in the agency-shop and integrated-bar contexts.

This difference in magnitude, if not in kind, suggests that compelled funding should be found unconstitutional because there are less restrictive ways for the government to pursue its educational goals than to require students to pay for political positions with which they disagree.

Assuming that a free-rider problem is found to exist in the educational context, the next question is whether the activities are tailored sufficiently narrowly to justify the imposition on the First Amendment.

The Breadth of "Education"

Infringement of First Amendment freedoms requires that the subsidized activity be germane to the governmental purpose. *Abood,* 431 U.S. at 235-36; *Keller,* 496 U.S. at 14. Because collective bargaining and regulation of the legal system are relatively narrow purposes, the germaneness requirement ensures that compelled speech is as narrowly drawn as possible.

Education, the governmental purpose purportedly served in the mandatory student fee context, is a significantly broader purpose than collective bargaining or regulation of the legal profession. While these latter purposes are narrow enough to provide some limits on compelled funding, education is not. The court below in

the case at bar recognized this when it stated that "everything is in a sense educational." *Southworth*, 151 F.3d at 725. The Supreme Court of California also recognized this in *Smith v. Board of Regents of the University of California*, 4 Cal. 4th 848 (1993), *cert. denied*, 510 U.S. 862 (1993), when it stated that in contrast to the purposes in the agency-shop and integrated-bar contexts, "the University's educational function is extremely broad; it potentially encompasses all of life." *Id.* at 855. Indeed, it is common wisdom that the best way to learn to do something is by doing it, and participation in the expressive activities of any student group will provide at least some educational benefit to those whom participate. Thus, it could be argued that the activities of all student groups are to some extent "germane" to the education of those who participate.

The broad nature of education, unlike collective bargaining and lawyer regulation, means that it does not provide a criterion that ensures that compelled speech is as narrowly tailored as possible. That a particular expressive activity is merely "germane" to education does not conclusively establish that the activity does not offend the First Amendment. The California Supreme Court recognized this in *Smith* when it stated:

> [A] group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf. To fund such a group through mandatory fees will usually constitute more of a burden on dissenting students' speech and associational rights than is necessary to achieve any significant educational goal. The University can teach civics in other ways that involve a lesser burden on those rights, or no burden at all. *Id.*

Amici suggest that, unlike collective bargaining and the regulation of the legal profession, education does *not* provide a criterion sufficient to establish the constitutionality of compelled funding. Rather, Amici suggest that the court below was correct in holding that subsidized political and ideological activities violate objecting students' First Amendment rights even if the funding somehow promotes education. Simply put, the government can pursue its interest in education in ways less restrictive to First Amendment rights than compelling students to fund political and ideological activities of voluntary, independent student groups with which they disagree simply because those activities might provide some educational benefit to other students.

The Meaning of "Political" Activity and the Insufficiency of the Educational Element

As discussed above, governments can pursue educational goals in ways less restrictive of First Amendment freedoms than to compel the funding of the political and ideological activities of student groups. Compelled funding must be as narrowly drawn as possible to achieve a legitimate government purpose, *Chicago Teachers Union v. Hudson*, 475 U.S. at 302-03; this suggests that compelled funding of political and ideological student activities is prohibited by the First Amendment.

In the *Rounds* decision, the Ninth Circuit stated that OSPIRG EF's activities were "educational," not "political." 166 F.3d at 1040. The *Southworth* court did not entertain such a distinction, and the Ninth Circuit's holding in this regard seems peculiar; indeed, in light of the record in the *Rounds* case, which is based upon OSPIRG EF's own statements and materials, it appears that OSPIRG does indeed engage in what fairly can be characterized as political or ideological activities. For example, the record establishes that OSPIRG EF engaged in the following activities (citations are to Exhibits A, B, and C, copied from the record):

- Lobbying President Clinton by sending post cards urging him to prevent a controversial timber sale in Oregon (Exhibit A at 2-3)

- Lobbying Congress by collecting signatures for an environmental petition to be sent to then Speaker of the House of Representatives Newt Gingrich and other members of Congress (Exhibit A at 6-7)

- Lobbying the Secretary of Energy by sending signed light bulbs in an effort to increase funding for renewable energy programs (Exhibit A at 8)

- Lobbying the Oregon legislature to retain the state's recycling program through a post card campaign and testifying at public hearings (Exhibit B at 1)

- Lobbying for the Toxic Use Reduction Act (Exhibit C at 2)

- Backing legislation to set "organic" food quality standards (*Id.*)

- Registering students as voters (Exhibit B at 2)

- Sending petitions to Congress to mark the 25th anniversary of Earth Day (Exhibit A at 4)

- Educating the general population about the Endangered Species Act (which was up for reauthorization before the 104th Congress) (Exhibit A at 5)

Amici believe that OSPIRG EF's activities do implicate First Amendment protections even though Amici have consistently conceded that there is some educational component to OSPIRG EF's activities. Amici also concede that there are many other voluntary student organizations on the University of Oregon campus that receive mandatory fee funds and that engage in activities that implicate the First Amendment; for example, the funding of the Muslim Student Association on the University of Oregon campus obviously raises the First Amendment issue of establishment of religion. Amici restricted their challenge to the mandatory funding to OSPIRG EF's political activities because, unlike all other entities that receive incidental fees from the University of Oregon, (i) OSPIRG EF directs its efforts to off-campus audiences (President Clinton, Congress, then-Speaker Gingrich, *etc.*), and (ii) the vast majority of funds OSPIRG EF receives from University of Oregon students is spent at OSPIRG EF's administrative headquarters in Portland and at other locations many miles distant from the Eugene campus. Amici claimed that these two factors – the off-campus nature of both the targets and the organizational heart of the funded group –

clearly implicated the First Amendment and that, because there was an insufficient nexus between the activities and the educational purpose, such funding was unconstitutional. Amici seek from this Court a ruling in the instant case that, at a minimum, preserves these claims before the Ninth Circuit and, perhaps, ultimately this Court.

CONCLUSION

Unlike the agency-shop and integrated-bar situations, no "free-rider" problem arises from the funding of voluntary student organizations with mandatory exactions. Accordingly, the First Amendment should be construed to prohibit those exactions. If, however, it is determined that mandatory exactions may, under certain circumstances, be used to fund voluntary student organizations, Amici respectfully submit that it would not be a constitutional use of such authority to fund an organization engaging in political activities that are (i) directed toward off-campus politicians and populations, and (ii) administered and governed from a geographic location many miles distant from the campus that is the source of the funds.

Respectfully submitted,

/s/ Thomas H. Nelson

Thomas H. Nelson
Of Attorneys for Amici

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OWEN BRENNAN ROUNDS, et al,	)	
	)	
Plaintiffs,	)	Case No. 95-6132-TC
	)	
vs.	)	
	)	
THE OREGON STATE BOARD OF HIGHER EDUCATION, et al,	)	
	)	
Defendants.	)	

DEPOSITION OF KALPANA KRISHNAMURTHY

BE IT REMEMBERED, That the deposition of Kalpana Krishnamurthy was taken, pursuant to the Federal Rules of Civil Procedure, on Friday, February 2, 1996, beginning at 10:05 a.m., at the law offices of Johnson, Clifton, Larson & Corson, 975 Oak, Suite 1000, Eugene, Oregon, before Sharon Gorham, CSR/RMR, Shorthand Reporter.

On the next page, it says, 37, Hunger and Homelessness.

A. Yeah.

Q. And you have to forgive me, I didn't go to U of O, so I'm not really as familiar with around here as I could. There's a sentence down here that says: "In advocating for the renovation."

A. Correct.

Q. It says: "In advocating for the renovation of the Amazon Housing Complex, OSPIRG students sent over 200 empty plates to the State Board of Higher Education." And this may be something that you can clarify really simple for me -- simply for me. What is the Amazon Housing Complex?

A. It's the only low-income student housing offered at the University of Oregon, or some of the only.

Q. Okay. That's fine. I didn't know, so I thought I'd ask.

Let's drop down to Ancient Forests.

A. Right.

Q. The second sentence starts: "OSPIRG students have been active for several terms educating the campus community about the value of ancient forests and advocating for their protection." If we drop down to the last sentence, it says: "More specifically, OSPIRG students

publicized local hearings around the Opal Creek issue and collected hundreds of postcards calling on Clinton to prevent the Sugarloaf timber sale."

Did OSPIRG engage in that activity?

A. OSPIRG worked with a coalition of student groups to engage in that activity, yes.

Q. What were the student groups involved in this coalition?

A. From what I remember, the Survival Center, the Oregon Student PIRG Education Fund, and how many other groups are under the Survival Center.

Q. How did you publicize local hearings?

A. I don't actually remember that.

Q. Okay. I'll ask the same question I asked previously about the postcards sent to the governor and the EQC. How -- were any of the materials sent to -- let me ask this question. At the time this was sent, would this reference to Clinton be a reference to President Clinton?

A. It would be a reference to the President of the United States, Bill Clinton.

Q. And what happened to be the printing -- were any of these postcards sent to the President printed?

A. Yes.

Q. And would you happen to remember where the printing was done?

Public Interest Research Group, engage in these activities?

A. The Oregon Student PIRG Education Fund did engage in a petition for the 25th anniversary of Earth Day. However, OSPIRG did not write 25 steps that Congress can take to protect the environment.

Q. Did the Oregon Student Public Interest Research Group send a petition to the United States Congress in relation to Earth Day? Or participate in that process? Excuse me, let me rephrase the question.

Did the Oregon Student Public Interest Research Group participate in sending a petition to United States Congress for the 25th anniversary of Earth Day?

A. Yes.

Q. Okay.

There's a lot of technology floating around nowadays. Are you familiar with the Worldwide Web or the Internet?

A. Barely.

Q. Barely. That makes two of us.

I'm going to hand you what's previously been marked Exhibit 129; the exhibit stamp is from Moore and Henderson, so I'm assuming that it's from the Portland depositions that were recently taken.

A. Um-hm.

Q. It says, "The PIRGs' Campus Chapters." And then

"According to OSPIRG leaders, several US Senators have made gutting the Endangered Species Act one of their top priorities and action needs to be taken to stop Congress from weakening the Act." Then it continues: "'The Endangered Species Act is the crown jewel of America's environmental laws and our best legal defense against growing -- against a growing tide of extinction and habitat destruction,' said Laura Siegal, OSPIRG's campaign coordinator. 'As Oregonians, we need to get active so our leadership -- so that our leadership prioritize this issue.'"

Let me ask a question. During your tenure, has the U of O chapter of OSPIRG been involved in strengthening the Endangered Species Act?

A. Well, no, we're not elected members of Congress.

Q. Okay. Have you had any campaigns or issues worked on by OSPIRG related to the Endangered Species Act during your tenure?

A. Yes.

Q. And what would those campaigns and activities be?

A. Educational forums on the Endangered Species Act. More importantly, a campaign with the Endangered Species -- or let me check. It was either National Wildlife or Endangered Species Coalition, that involved medicine pill bottles that we were sending to Congress,

A. Yes.

Q. It drops down and it says -- let's drop where it says "Krishnamurthy was Oregon's." Do you see that paragraph?

A. Got it.

Q. "Krishnamurthy was Oregon's sole representative in the Earth Day Campus Summit, part of the Earth Day 1995 Free the Planet campaign. The campaign's three objectives are to activate grassroots politics, stop corporate green washing, and pass environmental legislation in Congress, Krishnamurthy said."

Would that be a fair characterization of activities you did previously or anything you said previously?

A. Yes.

Q. It also went on to say: "April 22nd is Earth Day's 25th anniversary, and the campaign lasts through July 4th. OSPIRG has been collecting student signatures for the campaign, a so-called environmental petition to Newt Gingrich. Lee" -- oh, well, let's stop there.

Would that be a fair characterization of OSPIRG activities during that time period?

A. Yes.

Q. It goes on to say: "Lee Novak, OSPIRG's Free the Planet coordinator, said the purpose of the petition is to

tell Newt that this election was not a mandate against the environment. Novak said that OSPIRG students have collected 3,000 signatures from university students and hope to have 7,000 by April."

Let me ask this question. Was OSPIRG involved in activities in collecting -- okay. I retract that.

Was the U of O chapter of the Oregon Student Public Interest Research Group involved in obtaining signatures to be placed on a petition to be sent to any member of Congress in relation to the Free the Planet campaign?

A. Yes.

Q. Let's drop down to the paragraph that says: "She encourages."

A. Um-hm.

Q. No, I have no further questions on this one.

I don't think this has been entered previously. This will be the next exhibit, Exhibit Number 6.

This document is entitled, "The Report of the Oregon Student Public Interest Research Group." And on the second page of the document, it's dated January 1, 1995. Is that your signature at the bottom of the page?

A. Yes, it is.

MISS JOHNSON: One question about this document.

MR. BELNAVIS: Certainly.

renewable energy programs, providing OSPIRG with one of our first victories in the campaign for R.E.A.L., renewable, efficient, affordable, lasting energy."

Would that be a correct characterization of an OSPIRG -- let me rephrase the question.

Was OSPIRG involved in any manner in helping to increase in fiscal year 1995 funding for renewable energy programs?

A. Not directly, no.

Q. How about indirectly?

A. Students carried out a campaign known as Light Bulbs to O'Leery, where we had students signing light bulbs --

Q. Um-hm.

A. -- that said we support -- we support research into renewable energy resources.

Q. Okay.

A. It did not suggest numbers, it did not suggest -- as far as I remember, it did not suggest numbers or specific types of energy. It just said that students support renewable energy research.

Q. Who's O'Leery?

A. Hazel O'Leery, the Secretary of Energy. If there is -- Secretary of Energy.

Q. Okay.

OSPIRG

"The purpose of OSPIRG shall be to articulate and pursue through the courts, the media, the institutions of government and other legal means, the concerns of the students of the state of Oregon on issues of general public interest, in such areas as environmental preservation, and consumer protection." (*Petition and Resolution by students of the Oregon State System of Higher Education to create OSPIRG, submitted February, 1971*)

Driven by this ideal, students in Oregon have become one of the state's leading voices on consumer and environmental issues. The unique joining of student energy and idealism with professional knowledge and expertise has enabled OSPIRG to have a profound impact on issues that affect our quality of life today and for generations to come.

ENVIRONMENTAL ACTION/ EARTH DAY



From preventing the destruction of ancient forests in Oregon to protecting drinking water, environmental defense has long been of primary concern to students. Their accomplishments in this area have demonstrated an enduring investment in the future of our planet.

Environmental action programs encompass a wide variety of issues and activities. Students develop and teach environmental education programs, collect postcards to influence federal energy policies and bring noted speakers to campus. OSPIRG also has a history of spearheading Earth Day events. The Free the Planet campaign is an example of student efforts to promote grassroots action over corporate glitz on the 25th anniversary of Earth Day. These programs serve to educate the community about issues relevant to public health and the environment. Additionally, student work serves to motivate elected officials on a local, statewide and national scale to accurately represent the public interest.

RECYCLING



Students working with OSPIRG have been instrumental in the development of recycling programs on several campuses in Oregon, including the University of Oregon and Lewis & Clark College. Additionally, students have taken on campaigns to increase on-campus and statewide use of recycled products. Students are also tackling wasteful product packaging through a statewide Plastics Watch Campaign.

VOTER REGISTRATION



OSPIRG has long recognized the importance of students in the electoral process. Since the formation of the National Student Campaign for Voter Registration in 1984 over 1.2 million new voters have been registered.

Youth Vote '94, a national coalition of the PIRG's, Campus Green Vote, Green Corps, Rock the Vote and ACORN focused this year on registering and getting out the youth vote. Record numbers of students were registered and turned out to vote, dramatically demonstrating the power of students.

HUNGER & HOMELESSNESS



Every year students provide hundreds of hours of community service, organize public education events and fundraise around the issues of hunger and homelessness. Each fall OSPIRG organizes Hunger and Homelessness Week. The week includes speakers, sleepouts, food drives and fasts.

OSPIRG students also organize the single largest national community service day, the Hunger Clean-Up. Every spring, thousands of students join together to provide critical skills, labor and energy to non-profit relief organizations and shelters. The Clean-Up is also a fundraising event, with the money raised going to provide local and international relief.

TOXICS



Campaigns against toxic releases have resulted in the passage of landmark pollution prevention and toxic clean-up programs. Campus projects also expose the risks presented by the over-reliance on agricultural chemicals. Campaigns around dioxin and pesticides are challenging political leaders to protect public health by reducing the amount of toxics released into the environment. It is student research and innovative solutions that play an integral role in protecting Oregon's pristine environment from toxic contamination.

PAGE 2 OF 2
EXHIBIT O

OSPIRG1A000031

Exhibit B
Page 2 of 2

RECENT ACCOMPLISHMENTS

LANDMARK RECYCLING PROGRAM

In 1991, students from around the state worked to successfully create Oregon's landmark recycling program. In 1994, students overwhelmingly thwarted special interest attempts to gut that law by gathering hundreds of postcards and testifying at public hearings, preserving one of the strongest plastics recycling laws in the nation.

RECORD VOTER REGISTRATION

In 1994 over 22,000 students in Oregon and over 250,000 students nationwide registered to vote through the OSPIRG-founded Youth Vote '94 coalition. Students working with OSPIRG and student governments statewide mobilized an unprecedented number of new voters on election day.

NATIONAL HUNGER CLEAN-UP

Each year hundreds of students organize and participate in the nation's single largest volunteer service day. From weatherizing homes to cleaning out kitchens, students in Oregon annually organize Hunger Clean-Ups, accomplishing much needed work and also raising thousands of dollars for relief locally and internationally.

HARD HITTING CONSUMER REPORTS

Student research and resourcefulness has long been the lifeblood of the many consumer reports released each year by OSPIRG. In recent years, students have uncovered everything from playground safety violations to rising bank fees and dangerous products. By making these findings public, OSPIRG provides critical consumer information to the public.

HOW TO GET INVOLVED

OSPIRG PROGRAMS

Programs offered by OSPIRG are open to all students at schools with funded chapters. By designing and implementing campaigns, students gain issues expertise and valuable skills.

INTERNSHIPS

Many students gain course credit while working on issues that concern the future of the environment and society. Interns choose to work either with issue-based project groups or do independent research. Internships give students the opportunity to take their education out of the classroom, work with professional staff and do hands-on work in real life situations.

PROJECT COORDINATORS AND VOLUNTEERS

Involvement with OSPIRG can easily fit into even the busiest schedule. Whether you have 2 or 12 hours a week to volunteer, OSPIRG provides a unique opportunity to work on meaningful issues and make your campus community stronger.

FOR MORE INFORMATION CALL:

OSPIRG (503) 231-4181 x306
1536 SE 11th
Portland, OR 97214
Contact: Maureen Kirk

Campus Chapters:
University of Oregon (503) 346-4377
Lane Community College (503) 747-4501 x2168

Lewis & Clark College (503) 768-7128
Portland State University (503) 725-4500

OSPIRG

OREGON STUDENT PUBLIC INTEREST RESEARCH GROUP

EXB 116

OSPIRG1A000030

PAGE 1 OF 2
EXHIBIT O

Exhibit B
Page 1 of 2

What is OSPIRG?

Since 1971, the Oregon Student Public Interest Research Group (OSPIRG) has combined the power of student activism with the expertise of a professional staff to promote policy and legislation that preserves the environment, protects consumers and empowers citizens. Organized into campus chapters supported by student activity fees, OSPIRG provides students opportunities to attack social problems, learn from experienced researchers and advocates, and assume organizational responsibilities through their positions in local chapters and on OSPIRG's statewide Board of Directors.

In the process of achieving concrete goals, students take part in a unique extracurricular activity. Learning from active democratic experience, OSPIRG students successfully transform private concerns into public action to improve the quality of life for all Oregonians.

OSPIRG Accomplishments

OSPIRG students, staff and citizen members have won a variety of victories since 1971. Below is a partial list of recent accomplishments.

1990:

• OSPIRG releases the fifth annual report on dangerous toys, warning consumers prior to the holiday shopping season that not all toys are safe for children. Since 1988, OSPIRG studies have led the Consumer Product Safety Commission to recall six hazardous toys nationwide.

• OSPIRG organizes a student vote campaign involving 14 Oregon campuses and registering more than 10,000 students. OSPIRG also coordinates voter information fairs and assists with voter participation strategies.

• OSPIRG students organizes the Hunger Cleanup in Portland, Eugene and Corvallis. The Cleanup is the largest student-coordinated community service event in the country, raising thousands of dollars to help the hungry and homeless locally, nationally and internationally.

1989:

• OSPIRG successfully lobbies for the Toxics Use Reduction Act, a ground-breaking law requiring industry to reduce the use of toxic chemicals to stop pollution at its source.

• OSPIRG-backed legislation sets quality standards for foods labeled "organic." For the first time in Oregon, consumers are assured that when they buy organic food, it is truly organically grown.

1988:

• OSPIRG launches a consumer boycott of the New York Seltzer plastic can because of its detrimental effects on recycling, and wins company agreement to withdraw the can from store shelves nationally.

1987:

• OSPIRG wins its top priority in the legislature with the passage of the state Superfund, which will initiate a statewide search for abandoned toxic dumpsites and force the polluters to pay for the cleanups.

OSPIRG'S Internship Program: Practical Experience in the Real World

Many students are looking for more from a college education than they can find in the lecture hall or the library. By taking the theories taught in the classroom and applying them to "real-world" issues, students can be part of solutions to problems facing society.

OSPIRG's Internship Program is designed to give students opportunities to take their education beyond the classroom. OSPIRG interns gain a better understanding of public policy issues while getting hands-on experience in the skills of research, advocacy, organizing and lobbying, which are essential to effective citizen action.

(over)

Choose From a Wide Range of Internship Opportunities

OSPIRG's comprehensive environmental and consumer programs provide a variety of internship opportunities. Each internship is tailored to a student's interests and the amount of credit to be received. Internship options include:

Pollution Prevention

OSPIRG has been involved in preventing pollution from industrial toxics since 1985. The pollution prevention intern will learn skills of environmental research and data analysis by studying which toxics pose a real threat to the environment. Safe alternatives to toxic chemicals that reduce toxic pollution will also be explored.

Resource Conservation

The wandering Long Island garbage barge, the mideast crisis and the Exxon Valdez oil spill are obvious examples of the problems caused by dependence on resource consumption. If we are to build a sustainable future, we must focus more on resource conservation policies. The possible topics for this internship include researching recycling market development strategies, the viability of alternative auto fuels, or incentives to developing alternative sources of energy.

Consumer Protection

From its start in 1971, OSPIRG has been committed to protecting the rights of the consumer. Research options available for the consumer protection intern include credit card rates, renter's rights, consumer fraud in the used car business, and food and beverage labeling.

Publications

Publications interns work with OSPIRG's publications staff to produce the *Impact* (OSPIRG's statewide student report) as well as posters, fact sheets and other organizational publications. Depending on the individual student's interests, the internship may involve writing, layout design, photography and/or graphic arts.

Organizing

Organizing interns learn the skills of campaign strategies and grass-roots organizing by coordinating major campus campaigns and events. Skills include how to set and reach goals, recruit volunteers, develop leaders and run successful meetings.

Legislative Internships

The Legislative Internship Program, which offers students full-time internships during winter and/or spring term, allows students the opportunity to learn the intricacies of the Oregon Legislature in Salem. Working with OSPIRG's professional staff of lobbyists, interns conduct education campaigns, organize letter-writing drives, arrange state capitol "lobby days" and work with the media.

Other Possibilities

Opportunities do not end with those described above, nor do the options end in Oregon. Students are encouraged to pursue their own internship ideas with OSPIRG, the National Student Campaign Against Hunger and Homelessness (NSCAHH), or USPIRG, the PIRG national lobbying office in Washington, D.C.

Supervision and Training

Each OSPIRG internship offers students a structured experience under the supervision of professional staff. The organization's researchers, advocates, publicists and campus staff design programs so that students not only acquire new skills, but use their skills effectively to make an impact on public policy.

A professional staffperson works directly with each intern, training the student through day-to-day supervision and feedback. Students also have the opportunity to attend local, regional and statewide briefings, trainings, organizational retreats and student conferences where they learn more about public interest issues and political skills. At the end of each program, OSPIRG staff write an evaluation for each student, and recommend a grade when appropriate.

How to Get Credit

The process for getting college credit for internships varies from campus to campus. If you are not sure of your school's credit policies, the OSPIRG staffperson on your campus can help guide you to the appropriate faculty members or programs that sponsor internships.

Most interns work with a campus internship sponsor, most often a faculty member in the intern's chosen field of study. Your campus internship sponsor may ask you to keep a journal on your experience, read materials related to your subject, or write a paper on the results of your work.

The time commitment required of interns varies between internships and can be negotiated with the staff supervisor at the beginning of the term. With the exception of the full-time legislative internship, an intern can expect to spend from three to fifteen hours a week on his or her internship. Typically a student will receive one credit for every three hours of work a week.

How to Apply

Interested students are encouraged to apply for an OSPIRG internship at any time, although specific openings may vary. To apply, first talk with the OSPIRG staffperson on your campus, or contact the OSPIRG State Office (see below for office phone numbers). An internship coordinator will help you determine the option that suits you best. OSPIRG staff interview applicants to determine their qualifications. If you qualify, the staff will work with you to develop a specific internship proposal.

For more information or an application:

OSPIRG Internship Program
1536 SE 11th Ave.
Portland, Oregon 97214
(503) 231-1905

University of Oregon
(503) 346-4377

Portland State University
(503) 725-4500

Lewis and Clark College
(503) 768-7128

Lane Community College
(503) 747-4501 ext. 216

(32)

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IN THE
Supreme Court of the United States

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *et al.*,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

August 13, 1999

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AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

The National Right to Work Legal Defense Foundation, Inc. ("Foundation"), files this brief *amicus curiae* with the written consent of all parties. Sup. Ct. R. 37.3(a).[1] It supports Respondents' position that this Court should affirm the decision of the United States Court of Appeals for the Seventh Circuit.

[1] We have lodged letters of consent with the Clerk of the Court as required by Rule 37.3(a). Pursuant to Rule 37.6, the Foundation's counsel certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Foundation is a nonprofit, charitable, legal aid organization. Its purpose is to protect the right to work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. It is the only such organization operating on a national basis.

The Foundation has supported several major constitutional cases involving employees' rights to refrain from paying compulsory dues and fees to labor organizations for political activity, lobbying, litigation, and other forms of union ideological advocacy and activism. These cases, in which Foundation attorneys represented the plaintiff employees, include *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Foundation attorneys also have represented employees in many cases in lower courts that have involved application of the principles enunciated by this Court in *Abood* and later decisions.

The court of appeals relied on this Court's union-dues precedents in its decision in this case. *See Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998), *cert. granted sub nom. Board of Regents of Univ. of Wis. Sys. v. Southworth*, 119 S. Ct. 1332 (1999). Therefore, the Foundation is concerned with this case, because reversal of the court of appeals' decision could seriously undermine the constitutional rights of nonunion employees, recognized in *Abood* and its progeny, not to subsidize union political and ideological activity. The Foundation also believes that its attorneys' extensive experience in litigating union compulsory-dues cases will give the Court a unique and helpful perspective on the important issues this case involves.

SUMMARY OF THE ARGUMENT

Part I.

This Court's holdings in its decisions concerning the constitutionality of compulsory union agency fees and mandatory state bar dues control here, because these cases all involve coerced financial support of private or quasi-private organizations that engage in political and ideological advocacy. These cases all thus involve infringements upon the rights not to speak and not to associate for political and ideological purposes. These rights are at the core of the First Amendment and protected as fully as the rights to speak and to associate. Therefore, to pass constitutional muster, the schemes in these cases must meet traditional First-Amendment strict scrutiny, which requires the government to show that its regulations narrowly serve compelling governmental interests.

Although the Court has not explicitly so stated, it has in fact applied strict scrutiny in its union agency-fee and compulsory bar-dues cases. In those cases, the Court has not deferred to state claims of ambiguous state interests. Rather, it has required the state to show that a discrete, vital state interest justifies coerced financial support of the unions and bar associations. The Court also has narrowly limited constitutionally chargeable activities, protected by the First Amendment, to those that directly serve the governmental interest that justifies the compulsory fee. And, it has required that the procedures for determining chargeable costs be carefully tailored to minimize the infringement on First-Amendment rights.

Part II.

In *Lehnert v. Ferris Faculty Ass'n* the Court established a strict, three-part test for determining whether the costs of activities may constitutionally be included in mandatory fees: to be chargeable an activity must be (1) "'germane' to" the governmental purpose for which compelled association is justified; (2) justified by a "vital" governmental interest; and,

(3) "not significantly add to" any burden on First-Amendment rights inherent in coerced support of the governmental purpose justifying the fee. 500 U.S. at 519. The court of appeals correctly required that all three parts of this test be met here, because *Lehnert* stated it in the conjunctive, not the disjunctive. Moreover, as the various opinions in *Lehnert* all show, the Court there required that all three parts of the test be satisfied.

The Court's later decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), is not to the contrary. *Glickman* is distinguishable from these cases, because it did not involve coerced financial support of ***any*** political or ideological advocacy. Moreover, *Glickman* implicitly addressed all three prongs of the *Lehnert* test. It necessarily did so, because permitting coerced financial support of speech and association that meets only one part of that test does not satisfy due process, much less strict scrutiny.

Part III.

The court of appeals correctly rejected an escrow-and-refund remedy, and required instead an advance reduction of objecting students' fees to that amount that can, based on experience, be expected to be distributed to organizations engaged only in constitutionally chargeable activities. Such a reduction is required by this Court's decision in *Teachers Local 1 v. Hudson*. It is necessary, because state coerced ***collection*** of compulsory fees for a private organization ***inherently*** infringes on First-Amendment freedom of association, and because even temporary collection of amounts to which such an organization has no valid claim unjustifiably deprives an individual of his or her own property. Any burden that calculating an advance reduction, based on spending in a prior year, might impose on the party collecting the fees, or organizations that want to use them, does not justify the infringement on individual constitutional and property rights that occurs absent such a reduction.

ARGUMENT

I. Mandatory Student Fees, Like Compulsory Union Agency Fees and Bar Dues, Are Not Excepted from Normal First-Amendment Strict Scrutiny.

Petitioners, the members of the Board of Regents of the University of Wisconsin System (collectively, "the Board"), and most of its *amici curiae*, argue that this case is not controlled by this Court's holdings concerning the constitutionality of compulsory union agency fees and mandatory state bar dues, because those decisions did not involve a "limited public forum." (*E.g.*, Pet'rs' Br. at 29-30.) However, as the Board's *amicus curiae* American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") cogently explains, this Court's agency-fee and bar-dues cases do control here, because:

> There is no dispositive legal difference between mandatory fees that finance a forum for expressive activities and mandatory fees that otherwise further expressive activities. In both cases, the connection between the fee payer and the expressive activities is purely financial, rather than personal. In both cases, even the financial connection between the fee payers and the expressive activities may be more or less remote depending upon the number of organizational levels the fee passes through before being ultimately used for expressive activity. And, in both cases, the content of the expressive activity is not determined by the government.

(AFL-CIO Br. at 3.)[2]

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[2] The directness of the connection between the fee payer and the expressive activities was irrelevant in the agency-fee cases. *See Lehnert*, 500 U.S. at 516 ("To force employees to contribute, ***albeit indirectly***, to the promotion of [social, political, and ideological] positions implicates core

(continued...)

Where the AFL-CIO's argument, and the Board's alternative argument analyzing this case under the Court's agency-fee and bar-dues decisions, err is that they fail to acknowledge that these cases all require application of traditional First-Amendment strict scrutiny.

Governmental requirements that individuals, as a condition of public benefits, pay private and quasi-private organizations fees used for political and ideological purposes infringe on the First-Amendment freedoms of speech and association. *See Lehnert*, 500 U.S. at 516-17 (union agency fees); *Keller v. State Bar*, 496 U.S. 1, 9-10, 13-14 (1990) (mandatory bar dues); *Hudson*, 475 U.S. at 301-02 & n.9 (agency fees); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-36 (1977) (agency fees). This is so, because the "'right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all,'" *Lehnert*, 500 U.S. at 516-17 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); and because "'freedom of association . . . plainly presupposes a freedom not to associate.'" *Hudson*, 475 U.S. at 302 n.9 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

Consequently, just as in the union and bar cases, strict scrutiny is necessary in determining whether, and to what extent, the Constitution permits the requirements involved here. Where political and ideological speech and association are concerned, "regulation of First Amendment rights ***is always subject to exacting judicial review***." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) (emphasis added). To justify such regulations, the government must prove that they "'serve compelling state interests, unrelated to the suppression [or coercion] of ideas, that cannot be achieved through means significantly less restrictive of associational [and expressive] freedoms.'" *Hudson*, 475 U.S. at 303 n.11 (quoting *Roberts*, 468 U.S. at 623); *see Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

The Board and its *amici* ignore this traditional First-Amendment standard. They argue that the Court should defer to the Board's "academic judgment . . . that the provision of services to a diverse student body and the creation of a limited public forum for the expression of the full range of ideas of interest to students is . . . central to the University's educational mission." (Pet'rs' Br. at 43; *see, e.g.*, Am. Council on Educ. Br. at 16-17.) Strict scrutiny does not permit such deference.

Admittedly, the Court has not stated in those precise words that "strict scrutiny" applies in its union agency-fee and compulsory bar-dues cases. However, the Court does not always formally announce that it is applying strict scrutiny when it does so. On the other hand, the Court does usually except a class of regulation from First-Amendment strict scrutiny only explicitly, as it did with commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S.557, 561-63 (1980). The Court has not only not explicitly excepted the compulsory fee cases from strict scrutiny, but also has implicitly applied strict scrutiny in these cases, as four members of the Court pointed out in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 482-83 (1997) (Souter, J., dissenting).[3]

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[2] (...continued)
First Amendment concerns") (emphasis added); *Hudson*, 475 U.S. at 307 n.18 ("With respect to an item such as the [local] Union's payment of $2,167,000 to its affiliated state and national labor organizations, . . . either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so-used was surely required").

[3] Although the Court's opinion in *Lehnert* only implicitly applied strict scrutiny, Justice Scalia, joined by three other Justices, explicitly applied it in his opinion concurring in the judgment in part and dissenting in part. *See Lehnert*, 500 U.S. at 556-57 (opinion of Scalia, J.).

The Court recognized as much in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). *Riley* held that state action compelling speech is "content-based regulation" and "subject to exacting First Amendment scrutiny," unless the speech is purely commercial, because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795-98. The Court there cited *Abood* for the proposition that the First Amendment equally fully protects "compelled speech and compelled silence." *Id.* at 796-97.

When *Abood* addressed what union activities nonunion public employees may constitutionally be compelled to subsidize as a condition of employment, it gave ***no*** deference to the Michigan legislature's judgment that it served a valid state interest for public-sector exclusive bargaining agents to exact agency fees "for legislative lobbying and in support of political candidates," 431 U.S. at 215. The Court recognized that there may be a connection between those activities and public-sector collective bargaining. *See id.* at 228. However, it nonetheless ***rejected*** that connection as a basis for coercing speech and association, relying on strict-scrutiny cases such as *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion) and *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Abood*, 431 U.S. at 232-36.[4]

Abood held that the First Amendment prohibits a union's expenditure of dissenting nonmembers' agency fees "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative."

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[4] *See also Lehnert*, 500 U.S. at 517 (*Abood* "established that the constitutional principles that prevent a State from conditioning public employment upon association with a political party, see *Elrod*, . . . similarly prohibit a public employer 'from requiring [an employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job' as a public educator") (quoting *Abood*, 431 U.S. at 235) (citation omitted).

431 U.S. at 235-36. Thus, as the Court later put it in *Lehnert*, "chargeable activities must (1) be 'germane' to the collective-bargaining activity" of the union "and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519.

Lehnert's second criterion for chargeability is that "chargeable activities must . . . be justified by the government's ***vital*** policy interest in labor peace and avoiding 'free riders.'" 500 U.S. at 519 (emphasis added). The adjective "vital" shows that the Court was applying strict scrutiny, because "vital" means "essential to the existence or continuance of something; indispensable; . . . of greatest importance." *Webster's New Twentieth Century Dictionary* 2044 (2d ed. unabr. 1978).

Contrary to *amicus curiae* United States Student Association's assertion that "the term 'germane' cannot be given a cramped reading," (U.S. Student Ass'n Br. at 14), that term implies strict scrutiny. "Germane" means "closely related." *Webster's New Twentieth Century Dictionary* 767 (2d ed. unabr. 1978); *accord Black's Law Dictionary* 816 (rev. 4th ed. 1968). Thus, the only activities fully protected by the First Amendment that may constitutionally be charged to objecting fee payers are those that relate ***directly*** to the governmental interest that justifies the compulsory fee, *i.e.*, collective bargaining in the union case, and education here.

For example, the only "flexibility in its use of compelled funds" for activities "involv[ing] the expression of ideas" that the union was permitted in *Ellis v. Railway Clerks* was when those activities were "essential to the union's discharge of its duties as bargaining agent." *Compare* 466 U.S. 435, 448-51 (1984) *with id.* at 456-57 (conventions and nonpolitical publications). However, when expressive activities, such as organizing, had only an "attenuated connection with collective bargaining," *Ellis* held them nonchargeable even though they made the union "more successful at the bargaining table." *Id.* at 451-53.

This narrow reading of the germaneness test is reinforced by its application in *Lehnert*. Justice Blackmun, joined by three other Justices, determined that where "challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." 500 U.S. at 520 (opinion of Blackmun, J.). Justice Scalia, joined by an additional three Justices, agreed: "the challenged lobbying expenses are nonchargeable," because, "though they may certainly affect the outcome of negotiations, [they] are no part of th[e] collective-bargaining process." *Id.* at 559 (opinion of Scalia, J.). Only Justice Marshall disagreed, criticizing the "principal opinion" for "creating a ***very narrow*** rule for testing the constitutional acceptability of charges for lobbying activity." *Id.* at 535 (Marshall, J., dissenting in part) (emphasis added).

Unlike *Abood* and *Lehnert*, *Hudson* concerned procedures for collecting agency fees. It did not address "'the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters.'" *Hudson*, 475 U.S. at 294, 304 n.13 (quoting *Ellis*, 466 U.S. at 447). Nonetheless, *Hudson* also demonstrates that normal First-Amendment strict scrutiny is necessary in determining what activities objecting fee payers may constitutionally be required to subsidize.

In *Hudson*, the Court quoted *Roberts*, 468 U.S. at 623 (which cited *Abood*), *Elrod*, 427 U.S. at 363, and earlier statements of the strict-scrutiny test for the conclusion that,

> although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure [for determining chargeable costs] be ***carefully tailored*** to minimize the infringement.

475 U.S. at 302-03 & n.11 (emphasis added) (footnote omitted). Far greater reason exists to tailor carefully and apply narrowly the legal standard for determining chargeable costs, because the legal standard is even more important to that determination than the procedure by which the standard is applied.

The Court also implicitly applied strict scrutiny in *Keller v. State Bar*, 496 U.S. 1 (1990). *Keller* described constitutionally chargeable activities as those "germane to," or in which a state bar is "acting essentially as professional advisers to those ultimately charged with," "the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13-15. Thus, like the Court's agency-fee decisions, *Keller* requires that chargeable activities bear a ***direct*** relationship with the governmental interest supporting the compulsory fee. Moreover, *Keller* confirmed that the governmental interest that chargeable expenses must directly advance is not what a state or a state agency broadly asserts it to be, as the Board argues here. It is only the narrow, vital interest that ***this Court*** identifies as sufficient to justify a compulsory fee. *See id.*

Several of the Board's *amici* contend that *Abood* and its progeny are distinguishable, because those cases involved compelled support of particular viewpoints, while the mandatory fees here support multiple viewpoints. (*See, e.g.*, Brennan Cent. for Justice's Br. at 19-21.) That is an immaterial distinction. The right to refrain from speaking is a "right to refrain from speaking ***at all***." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added); *accord Lehnert*, 500 U.S. at 516-17. In *Abood*, the Court held that objecting nonmembers need not specify which union political and ideological expenditures they oppose; nonmembers adequately state a First-Amendment claim if they allege generally that they oppose "ideological expenditures of ***any*** sort that are unrelated to collective bargaining." 431 U.S. at 239-42 (emphasis added). Thus, for example, a union cannot constitutionally use objecting nonmembers'

agency fees for "soft money" contributions to both the Republican and Democratic parties, or for portions of a union publication airing both sides of a legislative issue.[5]

Amicus AFL-CIO suggests that strict scrutiny is unnecessary here because the "First Amendment interest in withholding otherwise valid financial exactions on the basis of conscientious objection to the eventual use of the money" is "relatively weak." (AFL-CIO Br. at 18.) *Amicus* Lesbian, Gay, Bisexual and Transgender Campus Center similarly argues that only a "balancing inquiry" is necessary, because "at most 'First Amendment interests' are implicated here, not any wholesale assault on a fundamental right." (Lesbian, *etc.*, Br. at 14 & n.7 (quoting *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997)).) These arguments are wholly without merit.

Limitations "upon the freedom to contribute [to political causes] 'implicate ***fundamental*** First Amendment interests.'" *Abood*, 431 U.S. at 234 (quoting *Buckley*, 424 U.S. at 23) (emphasis added). That individuals "are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Id.*; *see also Riley*, 487 U.S. at 796-97 ("in the context of protected speech, the difference [between compelled speech

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[5] The Court's approval of "public financing of election campaigns" in *Buckley v. Valeo*, 424 U.S. 1, 91-93 (1976), is not to the contrary. The Court there explicitly pointed out that the public financing "scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree," as in the agency-fee and bar-dues cases. *Id.* at 91 n.124. That scheme involves only "appropriation by Congress" of "public money." *Id.* at 91-92. The court of appeals correctly found that the mandatory student fees here are not public funds. *Southworth*, 151 F.3d at 732; *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840-41 (1995); *id.* at 851-52 (O'Connor, J., concurring); *cf. Keller*, 496 U.S. at 11-13 (the California State Bar is not a government agency for purposes of the First-Amendment rule against forced contributions to political and ideological causes).

and compelled silence] is without constitutional significance"). Consequently, to force individuals "to contribute, albeit indirectly, to the promotion of [social, political, and ideological] positions implicates ***core*** First Amendment concerns." *Lehnert*, 500 U.S. at 516 (emphasis added).

Glickman did not overrule this proposition. It confirmed it. *Glickman* accepted *Abood*'s premise "that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests ***because they interfere with values lying at the 'heart of the First Amendment.'***" 521 U.S. at 472 (quoting *Abood*, 431 U.S. at 234) (emphasis added). *Glickman* simply distinguished *Abood* and related cases because the assessments in *Glickman* were "not used to fund ideological activities," but only purely commercial product advertising. *Id.* at 469-70, 473-74.

The question presented here, as defined by this Court, is "[w]hether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are being used in part to support organizations that engage in ***political*** speech." *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 119 S. Ct. 1332, 1332-33 (1999) (granting certiorari) (emphasis added). Therefore, *Abood* and its progeny are not distinguishable. The Board must satisfy strict scrutiny to justify collection of the portion of these mandatory fees that subsidizes political and ideological speech.

II. Mandatory Fees Must Satisfy All Three Prongs of the *Lehnert* Test for the Chargeability of Activities.

Lehnert established a three-part test for the chargeability of union activities in an agency fee: "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; ***and*** (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519 (emphasis added). As

we have seen in Part I of this brief, this test is a particular application of strict scrutiny.

For mandatory fees generally, this test is (1) whether an activity in question is "'germane' to the [governmental] purpose for which compelled association [i]s justified"; (2) whether a "vital" governmental interest justifies coerced financial support of the activity; and (3) whether coerced financial support of that activity adds significantly to any burden on First-Amendment rights inherent in coerced support of the governmental purpose justifying the fee. *See Keller*, 496 U.S. at 13-14.

Because the *Lehnert* test uses the conjunctive, "and," not the disjunctive, "or," all three parts of the test must be satisfied for an activity to be constitutionally chargeable to an objecting compulsory fee payer. So concluded the court of appeals here:

> As *Lehnert* made clear, "germaneness" is not the be-all/end-all question in the constitutional analysis, but rather is only the first prong: Under *Lehnert*, not only must the mandatory fee be germane to some otherwise legitimate economic or regulatory scheme, the compelled funding must also be justified by vital interests of the government, and not add significantly to the burdening of free speech inherent in achieving those interests.

Southworth, 151 F.3d at 727; *accord Glickman*, 521 U.S. at 485 (Souter, J., dissenting).

Amicus AFL-CIO argues that *Glickman*, not *Lehnert*, "provides the most authoritative statement of the applicable principles," for two reasons. First, the AFL-CIO says, "*Glickman* is both later and more comprehensive." (AFL-CIO Br. at 10-11 n.7.) That claim is belied by the fact that, after *Glickman*, the Court repeated the *Lehnert* test in *Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761, 1766 (1998). Moreover, *Glickman* is distinguishable from this case, and from *Lehnert*, in a critical

respect. *Glickman* involved no question of coerced financial support of "***any*** political or ideological views." *Glickman*, 521 U.S. at 469-70, 473 (emphasis added).

The AFL-CIO also contends that *Glickman* is more authoritative than *Lehnert* because Justice Marshall: (a) joined in the portion of the *Lehnert* opinion stating the three-part test "only to the extent that it is consistent with Justice Marshall's own analysis" of the chargeability of lobbying expenditures; and, (b) described "the *Lehnert* plurality's three-part standard in the negative rather than the affirmative, indicating an understanding that all three mentioned conditions need *not* obtain before lobbying expenditures are chargeable." (AFL-CIO Br. at 10-11 n.7.) Both contentions misread *Lehnert*.

The AFL-CIO's first inference from Justice Marshall's opinion echoes Judge Rovner's assertion, in dissenting from the Seventh Circuit's denial of rehearing *en banc* here, that the portion of Justice Blackmun's *Lehnert* opinion dealing with lobbying activities "received the support of only four justices, and thus is not controlling." *Southworth v. Grebe*, 157 F.3d 1124, 1127 (7th Cir. 1998) (Rovner, J., dissenting). The AFL-CIO's and Judge Rovner's error is that they ignore Justice Scalia's opinion in *Lehnert*, concurring in the judgment in part and dissenting in part, joined by three Justices other than those who joined in Justice Blackmun's opinion.

In discussing the *Lehnert* three-part test, Justice Scalia contested only its vagueness and Justice Blackmun's "overly broad concept of 'germaneness'" in applying that test. *See* 500 U.S. at 550-51, 557-58 (opinion of Scalia, J.). Justice Scalia did ***not*** contest Justice Blackmun's conclusion that lobbying expenditures "outside the limited context of contract ratification or implementation" are nonchargeable, because they fail all three parts of the test, *id.* at 519-22 (opinion of Blackmun, J.).

To the contrary, Justice Scalia explicitly "***agree[d]*** that the challenged lobbying expenses are nonchargeable," because they "are no part of th[e] collective-bargaining process." *Id.* at 559

(opinion of Scalia, J.) (emphasis added). Because Justice Scalia also explicitly applied strict "First Amendment scrutiny," *see id.* at 556-57, he thus implicitly recognized that lobbying "outside the limited context of contract ratification or implementation" impermissibly adds significantly to the agency shop's burden on nonunion employees' First-Amendment rights. In short, Justice Blackmun's opinion concerning lobbying represented the views of the Court's majority and controls here.

The AFL-CIO's second inference from Justice Marshall's opinion—that all three prongs of the *Lehnert* test "need not obtain before lobbying expenditures are chargeable"—is directly refuted by Justice Marshall's opinion itself. Justice Marshall explicitly explained that,

> As the [principal] opinion observes, ***even if a given cost is found to be 'germane' to a union's collective-bargaining duties and to further the two governmental interests that inform the scope of germaneness***, the cost may still be nonchargeable if it involves "additional infringement of First Amendment rights beyond that already accepted [in the union shop arrangement], and . . . that is not justified by the governmental interests behind the union shop itself."

Id. at 539-40 (opinion of Marshall, J.) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984)) (emphasis added) (other alterations in original).

The opinions of the Court and Justice Scalia in *Lehnert* also refute the AFL-CIO's contention that all three parts of the *Lehnert* test need not be met for an activity to be chargeable. Part IV-F of Justice Blackmun's opinion is the opinion of the Court, because not only Justice Marshall joined it, but also Justice Kennedy. *Id.* at 534 (Marshall, J., concurring in part), 562-63 (Kennedy, J., concurring in the judgment in part). In that part, the Court concluded that expenses incurred preparing for an illegal strike that did not occur met the first two prongs of the test. Nonetheless, the Court found it necessary also to

determine that such expenses "impose no additional burden upon First Amendment rights." *Id.* at 531-32. And, Justice Scalia commented that "apparently all expenditures that pass" the Court's "germaneness" test "must also meet" the "two further tests" the Court added. *Id.* at 557 (opinion of Scalia, J.).

Thus, all of the *Lehnert* opinions show that all three parts of the *Lehnert* test must be met for an activity to be chargeable. In *Glickman*, Justice Souter, dissenting, objected that the Court there "***appears*** to hold that a compelled subsidy of speech does not implicate the First Amendment if the speech either is germane to an otherwise permissible regulatory scheme or is non-ideological, so that each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy." 521 U.S. at 483 n.3 (Souter, J., dissenting) (emphasis added). However, we respectfully submit that the Court did not so hold, and could not correctly have so held, in *Glickman*.

Such a holding was not necessary to the Court's decision in *Glickman*, because the commercial speech at issue there was ***both*** "unquestionably germane to" the governmental interest served by the regulatory scheme ***and*** nonideological. *Id.* at 473 (opinion of the Court). Moreover, in making ***both*** of those determinations, rather than just one or the other, *Glickman* in fact implicitly addressed all three prongs of the *Lehnert* test. *See id.* at 471-73. It did so necessarily because, as we have just shown, the entire Court agreed in *Lehnert* that, as Justice Marshall there said,

> even if a given cost is found to be "germane" to a union's collective-bargaining duties and to further the two governmental interests that inform the scope of germaneness, the cost may still be nonchargeable if it involves "additional infringement of First Amendment rights beyond that already accepted [in the union shop arrangement], and . . . that is not justified by the governmental interests behind the union shop itself."

500 U.S. at 539-40 (opinion of Marshall, J.) (quoting *Ellis*, 466 U.S. at 456) (alterations in original).

The obverse also must be necessary for coerced financial support of speech or association to be constitutional. That is, even if a private organization's activity is not political or ideological, coerced support of it is not constitutionally permissible unless it is germane to a governmental interest served by the regulatory scheme involved. The necessary degrees of "germaneness" and strength of the governmental interest might be lesser in such a case, as *Glickman* ruled. Even so, the activity must bear ***some*** relationship to a legitimate ***governmental*** interest, or the coercion is not rational, much less justified by a compelling governmental interest.

Thus, for example, in upholding the chargeability of "[i]nformational support services" in the union's publication in *Lehnert*, the Court held that those expenditures occasioned "no additional infringement of First Amendment rights," because the speech was "neither political nor public in nature." Yet, the Court also found it necessary to decide that those services were germane to collective bargaining: "[a]lthough they do not ***directly*** concern the members of petitioners' bargaining unit, these expenditures ***are for the benefit of all***. . . . [T]hese expenses are comparable to the *de minimis* social activity charges approved in *Ellis*." *Lehnert*, 500 U.S. at 529 (emphasis added). Significantly, the social activities at issue in *Ellis* were held chargeable because, "[w]hile these affairs are not central to collective bargaining, ***they are sufficiently related to it*** to be charged to all employees." 466 U.S. at 449 (emphasis added).

However, as the First Circuit recognized in *Schneider v. Colegio de Abogados*, if government "compel[s] certain individuals to help pay for a *private* benefit system for other individuals," that is "an arrangement that triggers due process concerns if not First Amendment ones." Consequently, mandatory fees "may be used to finance only core activities not including 'nongermane, nonideological' ones." 917 F.2d 620, 638 (1st Cir. 1990) (quoting *Teachers Local 1 v. Hudson*, 475

U.S. 292, 304 n.13 (1986)); *see also Hudson v. Teachers Local 1*, 743 F.2d 1187, 1194 (7th Cir. 1984) ("due process" "implies that [an agency-fee] procedure must make reasonably sure that [objecting nonmember] employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological"), *aff'd on other grounds*, 475 U.S. 292 (1986).

In sum, the *Lehnert* three-part test is necessarily conjunctive, as the Court itself stated it and has applied it, not disjunctive, as *amicus* AFL-CIO would like to have it. The court of appeals correctly required the Board to show how the transfer of mandatory student fees to organizations that engage in political and ideological speech satisfies all three parts of the test. Moreover, because political and ideological speech are at stake here, all three parts of the test apply in their strictest form. The court of appeals found that the coerced subsidies here did not meet any part of that test even without strict scrutiny. *See Southworth*, 151 F.3d at 735. Therefore, those subsidies, with even greater reason, "also cannot survive the more exacting strict scrutiny standard." *Id.* at 731 n.13.

III. Because Collecting Compulsory Fees Compels Association and Takes Individuals' Property, Advance Reduction to Exclude Undeniably Nonchargeable Amounts Is Required by the First Amendment and Due Process.

The court of appeals held that "the University cannot even temporarily collect from objecting students the portion of the fees which would fund organizations which engage in political and ideological activities, speech, or advocacy." *Id.* at 735 (emphasis omitted). The Board's *amicus curiae* University of California Student Association ("Association") argues that the court of appeals should, instead, have accepted "the University's proposal for a refund mechanism." The Association claims that this Court's "compelled speech cases make clear that it is constitutionally acceptable to collect fees from dissenters, place them into an interest bearing escrow account, and to subsequently refund the portion of the fees that were

[*sic*] used for nonchargeable political or ideological activity." (U. Cal. Student Ass'n Br. at 16.)[6]

The court of appeals' rejection of a refund mechanism was not error, as *amicus* Association argues, (*id.*). It was both appropriate and necessary under this Court's decisions.

The Association relies on the fact that *Ellis*, 466 U.S. at 443-44, identified "advance reduction of dues and/or interest-bearing escrow accounts" as "readily available alternatives" to the statutorily and constitutionally impermissible "pure rebate approach." (*See* U. Cal. Student Ass'n Br. at 16-17.) However, as *Hudson* explained, *Ellis* merely "noted the possibility of 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts.'" *Ellis* did ***not*** decide whether an interest-bearing escrow account without advance reduction would be constitutionally sufficient, because, "for purposes of that case, it was sufficient to strike down the rebate procedure." *Hudson*, 475 U.S. at 304 (quoting *Ellis*, 466 U.S. at 444).

Whether an advance reduction is necessary was addressed for the first time in *Hudson*.[7] The union there had established an escrow for 100% of objectors' service fees. This Court held that, ***in addition*** to that escrow, and other safeguards, an "appropriately justified ***advance reduction . . . [is] necessary*** to minimize both the impingement [of the agency shop on employees' First-Amendment interests] and the burden" of objection. *Id.* at 309 (emphasis added). It would not have been necessary

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[6] The fees would be both in escrow and "used for nonchargeable political or ideological activity," because the Association's proposal is for escrow of only part of the fees. *See infra* pp. 26-27.

[7] However, *Ellis* did refer approvingly to the fact that the Court had earlier "suggested a ***more precise advance reduction*** scheme in *Railway Clerks* v. *Allen*, 373 U.S. 113, 122 (1963)." 466 U.S. at 443 (emphasis added).

for the Court to hold that the union must "provide ***adequate justification*** for the advance reduction of dues," *id.* (emphasis added), if the Court required no advance reduction at all.

The Association claims that "a majority of the circuits . . . have upheld the use of escrow-refund mechanisms." (U. Cal. Student Ass'n Br. at 23.) However, only one circuit has unequivocally held that *Hudson* does not require advance reduction; and that was a split decision. *Gibson v. Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990) (2-1 decision), *cert. dismissed*, 502 U.S. 104 (1991). The positions on this issue of the other circuits the Association cites are hardly clear:

- *Grunwald v. San Bernardino City Unified School District* held that "escrow accounts obviate the need for advance reductions." 994 F.2d 1370, 1374 n.2 (9th Cir. 1993).[8] However, it also interpreted "*Hudson* as expressing a ***strong preference*** for identifying nonunion members early enough so that the deduction-escrow-refund procedure can be avoided altogether." Therefore, *Grunwald* ruled that, to "employ the more cumbersome and intrusive deduction-escrow-refund procedure, the union must . . . show that the preferred method of doing things[, *i.e.*, advance reduction,] is impossible or, at any rate, far more costly or cumbersome." *Id.* at 1375 (emphasis added).[9] That has not been shown here. *See infra* pp. 27-28.

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[8] *But cf. Dean v. TWA*, 924 F.2d 805, 809 (9th Cir. 1991) (the argument that an objecting nonmember "should have sought a judicial injunction against collection of the dues" by a union that had no *Hudson* procedures, "rather than reducing payment and challenging the dues after [his] discharge" for noncompliance with an agency-shop agreement, "is inconsistent with the Supreme Court's rejection of ***any type*** of rebate remedy") (emphasis added).

[9] The *Grunwald* panel split 2-1 on whether the union had met that burden. *Compare* 994 F.2d at 1376 (majority opinion) *with id.* at 1378-80 (Brunetti, J., dissenting).

• Advance reduction was not an issue, and apparently was part of the union's collection procedure, in *Andrews v. Cheshire Education Ass'n*, 829 F.2d 335 (2d Cir. 1987). *See id.* at 337-41.

• *Crawford v. Air Line Pilots Ass'n* interpreted this Court's decisions as permitting "an escrow-and-rebate plan." However, that was *dicta*, because the union there gave an "advance reduction" to objecting nonmembers who opted out of payroll deduction and paid their fees directly. *See* 870 F.2d 155, 161 (1989), *adopted en banc*, 992 F.2d 1295, 1302 (4th Cir. 1993). Moreover, *dicta* in another Fourth Circuit case concluded that an advance reduction is constitutionally required under *Hudson*:

> The core principle underlying all of the decisions prescribing allocation procedures is that the correct amount of a service fee to be charged nonunion employees for collective bargaining must be established, to the extent practicable, *in advance*. . . .
>
> . . . [T]his underpinning principle mandates that the union follow required procedures in advance of assessing a fee. . . .

Dashiell v. Montgomery County, 925 F.2d 750, 756 (4th Cir. 1991).

• The First Circuit's opinion in *Schneider v. Colegio de Abogados* does not indicate that the plaintiffs contended that advance reduction was required, so the court did not address the issue. *See* 917 F.2d 620, 626-27, 635-37 (1st Cir. 1990).

• The decision in *Hohe v. Casey* cited by the Association was on an appeal from denial of a preliminary injunction. That decision explicitly was "not intended to intimate any opinion regarding the ultimate merits." 868 F.2d 69, 70, 74 n.7 (3d Cir. 1989). Moreover, the procedure in *Hohe* provided an advance reduction, so that what the union escrowed there was the

amount remaining after it had already reduced the employees' fees. *See Hohe v. Casey*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir. 1989).

In contrast to these cases, two different panels of the Sixth Circuit have squarely and unequivocally ruled that

> *Hudson* clearly rejects the premise that a union may continue to collect a service fee equal in amount to the union dues once a non-union member has objected to such a procedure. Rather, the union must instead deduct from the service fee that amount which is undisputedly used for political or ideological functions.

Damiano v. Matish, 830 F.2d 1363, 1369 (6th Cir. 1987); *accord Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987).[10] In *Damiano*, the court explained that this "advanced reduction method is clearly a less burdensome method of accommodating non-union employees," because escrow of the part of dues that indisputably represents ***non***chargeable expenses "would unduly deny the employee's unqualified right to his property" and "insure that the dissenting employee could

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[10] *See also Finerty v. NLRB*, 113 F.3d 1288, 1290 (D.C. Cir.) (dictum) (quoting *Ellis*, 466 U.S. at 457 n.15) ("the union must calculate 'what proportion of [union] expenditures went to activities that could be charged to dissenters' and then make an appropriate ***reduction*** in the agency fee required of objecting nonmembers") (emphasis added) (other alteration in original), *cert. denied*, 118 S. Ct. 558 (1997); *In re Chapman*, 509 A.2d 753, 764-65 (N.H. 1986) (Souter, J., concurring) (citing *Hudson* for the proposition that one way to avoid the violation of First-Amendment rights caused by use of compulsory bar dues for lobbying "would be to require the [bar] to provide a mechanism for a ***reduction in dues*** reflecting the extent to which the lobbying is not germane or reasonably related to those responsibilities approved in *Lathrop" v. Donohue*, 367 U.S. 820 (1961)) (emphasis added).

not use this property for his own preferred political, ideological or other elected purposes." 830 F.2d at 1369-70.

The escrow-refund scheme proposed by *amicus* Association is inconsistent with two principles on which *Hudson* rests.

First, although "a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," additional procedural safeguards are necessary, "because ***the agency shop itself*** impinges on the nonunion employees' First Amendment interests." *Hudson*, 475 U.S. at 309 (emphasis added). However, if coerced financial support of a private association impinges on First-Amendment rights even with no risk of improper spending, then not only spending is the infringement, but also collection. Consequently, *Hudson* enunciated "constitutional requirements for the Union's ***collection*** of agency fees," *id.* at 310 (emphasis added), not just "'a way of preventing compulsory subsidization of ideological activity,'" *id.* at 302 (quoting *Abood*, 431 U.S. at 237).

Here, the taking of property itself gives rise to a First-Amendment claim, because it ***serves goals that themselves infringe upon First-Amendment freedoms***, as in *Elrod v. Burns*, 427 U.S. 347 (1976), *Abood*, *Hudson*, and *Keller v. State Bar*, 496 U.S. 1 (1990). The First-Amendment infringement inherent in the taking in these cases is forced association with a private or quasi-private organization through the coerced collection of contributions, fees, or dues. *See Keller*, 496 U.S. at 13; *Hudson*, 475 U.S. at 301-02 & nn.8-9; *Elrod*, 427 U.S. at 355 (plurality opinion).[11] The individual's inability to use those funds for his or her own expressive and associational purposes,

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[11] "Compelled support of a private association is fundamentally different from compelled support of government." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment); *see Buckley v. Valeo*, 424 U.S. 1, 91 & n.124 (1976). The organizations for which the fees at issue here are collected are indisputably "private organizations." *Southworth*, 151 F.3d at 719-20.

identified in *Damiano*, is an additional effect of the forced association first recognized in *Elrod*, 427 U.S. at 355-56 (plurality opinion).

When free association is infringed, even if only partially, as by the contribution limitations in *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976), the infringement may be sustained only "if the State demonstrates a sufficiently important interest and employs means ***closely drawn*** to avoid ***unnecessary*** abridgment of associational freedoms." *Id.* at 25 (emphasis added). In *Abood*, *Hudson*, and *Keller*, the Court found such a state interest, but only to the extent that compulsory fees are limited to a proportionate share of the costs of certain functions of a union or compulsory bar association ***and*** collected with certain "carefully tailored" procedural safeguards. *Hudson*, 475 U.S. at 302-03; *see Keller*, 496 U.S. at 13-17.

"Careful" or "narrow tailoring" may not "require elimination of ***all*** less restrictive alternatives." *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989) (emphasis added). However, it does "require the government goal to be substantial, and the cost to be ***carefully*** calculated. Moreover, since the State bears the burden of justifying its restrictions, it must ***affirmatively establish*** the reasonable fit" between the restrictions and the state's objective. *Id.* at 480 (emphasis added) (citation omitted).

Second, in "this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. Even if the deprivation is only temporary, "[d]etermining the adequacy of predeprivation procedures requires consideration of the Government's interest in imposing the temporary deprivation, the private interests of those affected by the deprivation, the risk of erroneous deprivations through the challenged procedures, and the probable value of additional or substitute procedural safeguards." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (plurality opinion); *see Connecticut v. Doehr*, 501 U.S. 1, 11-12 (1991).

Escrow without advance reduction satisfies neither First-Amendment careful tailoring nor the due-process test, particularly here.

There may be "practical reasons why '***[a]bsolute*** precision' in the calculation of the charge to nonmembers cannot be 'expected or required,'" *Hudson*, 475 U.S. at 307 n.18 (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)) (emphasis added). Nonetheless, ***some*** meaningful degree of "'[p]recision . . . must be the touchstone' in the First Amendment context." *Id.* at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 414, 438 (1963)). Collection of monies that indisputably will not be used for lawfully chargeable activities, even if escrowed and later rebated, is inherently ***im***precise. It thus violates the First Amendment, because it is a means "substantially broader than necessary to achieve the government's interest," *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989), in seeing that all individuals in a particular group subsidize only lawfully chargeable activities. Coerced payment of monies to which a private organization is not entitled, whatever the amount, is an infringement on the individual's associational freedom different ***in kind*** from, and thus materially greater than, payment of monies that the organization is arguably due.

Collection of nonchargeable amounts also denies due process. It presents a ***certainty*** of erroneous deprivation. And, it adversely affects the individual's interests, not just in having more money, but also in not associating with a private organization more than necessary to serve the state's interest in mandatory association and in "us[ing h]is property for his own preferred political, ideological or other elected purposes." *Damiano*, 830 F.2d at 1370.

Moreover, the escrow-and-refund scheme proposed here by *amicus* Association would almost inevitably permit the private organizations receiving objecting students' fees to ***spend*** them for constitutionally nonchargeable political and ideological purposes. Under that scheme, only a "proportion of the fees based on previous years' experiences with refund requests

[w]ould be placed in escrow." (U. Cal. Student Ass'n Br. at 10.) In other words, only the part of the fees that, based on experience, is undoubtedly nonchargeable would be escrowed.[12] The remainder, including portions that objecting students might reasonably dispute, would be given to the private associations for unrestricted spending. The Association admits as much when it says that the University would "subsequently refund the portion of the fees that were [*sic*] ***used*** for nonchargeable political or ideological activity." (*Id.* at 16 (emphasis added).)

The Association argues that advance reduction would infringe on the right of "the majority of students who have no objection to the use of their fees for political activities . . . to engage in and financially support such speech without being silenced by the minority." (*Id.* at 6.) This argument is bogus. The court of appeals' advance reduction applies only to the fees of "*objecting* students." *Southworth*, 151 F.3d at 735. No one would be "silenced." The private organizations receiving student fees would be free to use the fees of students who do not object for politics. However, the "majority" has no right to compel others to support its chosen speech: "The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 776 (1994).

The Association also argues that "a refund-escrow system is the only practical way to institute a student fee reduction," because "neither student government nor the university has sufficient information at the time fees are collected to calculate

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[12] This is precisely the opposite of what *Hudson* contemplated. *Hudson* did not hold that "a 100% escrow is constitutionally required," because it allowed that unions need not escrow the independently audited portion of objecting nonmembers' fees "that no dissenter could reasonably challenge." Unions must escrow only "the amounts reasonably in dispute." 475 U.S. at 310 & n.23. That does not include the portion a union concedes it cannot reasonably claim to retain based on the prior year's expenses.

what fees, if any, will be used in the upcoming school year for political and ideological activity." (U. Cal. Student Ass'n Br. at 8-10). This argument, too, is wholly without merit.

A union does not know what political activity it will undertake in the coming year when it sets its dues and the fee reduction for objecting nonmembers before a fiscal year begins. *Hudson* considered that fact by permitting the advance reduction to be based on the preceding year's expenditures. 475 U.S. at 307 n.18.[13] The Association ***concedes*** the feasibility of that practice here, because it proposes that the partial escrow amount can be "based on previous years' experiences." (U. Cal. Student Ass'n Br. at 10.)

The Association's spurious "practical" argument against advance reduction is at best merely a complaint that advance reduction is administratively inconvenient. However, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974). "Nor is additional expense occasioned by [meeting the ordinary standards of due process] sufficient to withstand the constitutional requirement." *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). Therefore, the "'burden or inconvenience'" of annually determining the constitutionally chargeable portion of mandatory fees ***before*** collecting the fees "'is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 496 U.S. at 16-17 (quoting with approval *Keller v. State Bar*, 767 P.2d 1020, 1046 (Cal. 1989) (Kaufman, J., dissenting)); *see also Ellis*, 466 U.S. at 444 ("administrative convenience" is insufficient justification for denying objectors an "advance reduction of dues and/or interest-bearing escrow accounts").

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[13] *See also Allen*, 373 U.S. at 122-23 & n.8 (while "the proportion of the union budget devoted to political activities may not be constant," a dissenting nonmember is ***"entitled" to "a reduction of future . . . exactions*** from him by the same proportion" that nonchargeable expenses bear to total expenses) (emphasis added).

In sum, the court of appeals correctly rejected any sort of refund scheme and properly enjoined the Board to carry out an advance reduction procedure.

CONCLUSION

Except for its failure to acknowledge that strict scrutiny applies, the court of appeals correctly decided this case. Students, like employees and attorneys, have a fundamental First-Amendment right to choose freely the political and ideological causes they support with their money. State-coerced financial support of private organizations that engage in political and ideological advocacy does not directly serve government's educational interest in the university context. Moreover, to the contrary, as the court of appeals recognized, "forcing objecting students to fund objectionable organizations undermines that interest," because it is inconsistent with "the values of individualism and dissent" that are, or should be, taught in this nation's institutions of higher education. *Southworth*, 151 F.3d at 728.

For the above reasons, the Court should affirm the court of appeals' decision.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record for Amicus Curiae
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

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No. 98-1189

In The

Supreme Court Of The United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *ET AL.*

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief Amicus Curiae of ATLANTIC LEGAL FOUNDATION In Support of Respondents

Martin S. Kaufman*
Edwin L. Lewis, III
Atlantic Legal Foundation
205 East 42nd Street
New York, NY 10017
(212) 573-1960
Counsel for Amicus Curiae

* *Counsel of Record*

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No. 98-1199

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, *et al.*

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

This brief is submitted by Atlantic Legal Foundation, Inc. in support of respondents.

This Court has before it an important constitutional question: whether a public university can force objecting students to fund private organizations which engage in political and ideological activities, speech, and advocacy. The Court of Appeals and district court concluded that it could not, and we believe that these judgments were correct.

Atlantic Legal Foundation urges affirmance of the determination by the United States Court of Appeals for the Seventh Circuit that the funding of political and ideological advocacy by private student groups through a mandatory student activities fee violates the First Amendment rights of students who do not agree with the views advocated by such groups.

INTEREST OF AMICUS

Atlantic Legal Foundation ("ALF") represented the student plaintiffs in two of the cases that have been cited by both sides in this case: *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985) and *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.1992). ALF is thus familiar with the relevant law, and intimately familiar with the way in which public universities seek to promote political speech and activism through compelling students to fund the speech of others.[1,2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than Atlantic Legal Foundation or its counsel.

[2] We are advised that the parties have filed consents to the submission of *amicus curiae* briefs supporting both sides in this case.

STATEMENT OF THE CASE

Students attending the University of Wisconsin-Madison must pay a student activity fee. A portion of this mandatory fee is distributed to private organizations which engage in political and ideological activities. Plaintiffs, students at the University of Wisconsin-Madison, sued the Regents of the University, under 42 U.S.C. §1983, claiming that forcing objecting students to fund such organizations violates their First Amendment rights, as well as other federal and state statutes. The United States District Court for the Western District of Wisconsin granted plaintiffs summary judgment on their freedom of speech and association claims, dismissed the remaining claims, and entered an injunction which both barred such funding and established a detailed opt-out mechanism (Pet. Ap. 78a-99a). The United States Court of Appeals for the Seventh Circuit affirmed the district court's determination that forcing objecting students to fund private organizations which engage in political and ideological activities violates the First Amendment (*Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998), Pet. Ap. 13a-51a).

FACTUAL AND PROCEDURAL BACKGROUND

We adopt the statement of the procedural and factual background of the case found in the opinion of the United States Court of Appeals for the Seventh Circuit, *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998)(Pet. Ap. 13a-51a). Subsequent to the Court of Appeal's decision on the merits, that court denied the petition of petitioners for rehearing, which denial is reported at 157 F.3d 1124 (7th Cir. 1998)(Pet. Ap. 1a-12a).

There is no real dispute that many of the student groups funded through the mechanism of the mandatory fee engage in political and ideological activities. Many of them engage in political lobbying at the local, state and national level; some of them overtly support political candidates; some of them are part of national organizations, and send a portion of the monies they receive from the student fee funds to state-wide or national organizations, which in turn lobby and support political candidates. Many of them advocate positions on issues that have little or no relation to campus life or to the concerns of students *qua* students (as distinct from concerns many people, including but not limited to students, share). Many of the student-fee funded groups advocate strong ideological positions. 151 F.3d at 720-722.

SUMMARY OF ARGUMENT

The prohibition of the use of mandatory student fee money to fund political and ideological speech and political action by private groups does not impair the educational function of a university. There is no threat to "campus life" because many activities that are part of the educational experience would be untouched by the elimination of funding of private political and ideological groups. Voluntary contributions would be sufficient to foster diverse political or ideological advocacy.

The elimination of forced funding of political and ideological speech does not infringe the speech rights of those groups that heretofore have been funded. There is no constitutional right to have one's speech subsidized by others.

ARGUMENT

I.

THE PROHIBITION ON MANDATORY FUNDING OF POLITICAL AND IDEOLOGICAL SPEECH BY PRIVATE GROUPS DOES NOT IMPAIR THE EDUCATIONAL FUNCTION OF THE UNIVERSITY

There is no threat to "campus life" or the "educational experience" as some *amici* supporting the Regents assert. The students do not challenge the Regents' use of the non-allocable portion of the student activity fee to pay for operating costs of auxiliary operations, to pay debt service, to provide student health services, to support the Wisconsin Union [the student center], to finance the recreational sports budget and to provide required reserves for these functions.

The students also do not challenge the Regents' use of the allocable portion of the student activity fee to fund the student government; the Regents' use of the allocable portion of the student activity fee to fund the student newspaper, or the Distinguished Lecture Series; the Regents' use of the allocable portion of the student activity fee to fund private organizations which do not engage in political or ideological speech, activities, or advocacy; or, indeed, the Regents' use of the allocable portion of non-objecting students' activity fees to fund private organizations engaging in political or ideological speech, activities, or advocacy; *See* 151 F.3d at 721-722

II.

THE DENIAL OF FUNDING DOES NOT INFRINGE THE RIGHTS OF OTHER STUDENTS

The Regents do not dispute that these private groups engage in political and ideological speech. Instead, they argue that the First Amendment protects the rights of these organizations to engage in such speech. That is a classic red herring: the students do not ask that the speech of any student organization be restricted, they merely ask that they not be compelled to subsidize speech with which they do not agree[3].

The Regents and the *amici* supporting them rely on the First Amendment's guarantee of free speech as support for their position. They argue that the university can create a "forum of money" so long as the forum is viewpoint-neutral. This argument misapprehends the issue and the teaching of this Court.

There is no threat in the students' position and the Court of Appeals decision of restricting the speech of any private organization. *See, e.g., Smith v. Regents of the University of California*, 4 Cal.4th 843, 16 Cal.Rptr.2d 181, 844 P.2d 500, 503 (1993) ("In fact, the case has nothing to do with

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[3] The Court of Appeals characterized the students' position as a desire not to subsidize speech with which they disagree, but the students themselves, and we also, urge that an objector need not disagree with the speech of others in order to be exempt from funding that speech, rather the objector has a right to abstain from supporting that speech even if he or she is neutral or apathetic about the issue.

restrictions on speech. It goes without saying that all students are free to organize, to promote their ideas, and to seek by all legal means to persuade others that their views are correct...."). The Regents and their supporters would convert a right to speak by some into an entitlement to have others unwillingly facilitate, aid and abet that speech.

III.

THE COMPELLED FINANCING OF POLITICAL AND IDEOLOGICAL SPEECH OF OTHERS INFRINGES OBJECTORS' CONSTITUTIONAL RIGHTS AND THERE IS NOT VITAL GOVERNMENTAL INTEREST SERVED BY SUCH INFRINGEMENT.

This Court has long recognized two necessary corollaries to the First Amendment's guarantee of free speech: the right not to speak, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); and the right not to be compelled to subsidize others' speech, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. (1990). It is based on these familiar corollaries, and specifically *Abood* and *Keller*, that the plaintiffs challenge Wisconsin's mandatory student fee policy. The First Amendment does not guarantee that the government will subsidize speech, *see*, *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 n. 9 (1986) ("[T]here is no right to have speech subsidized by the Government."), and, indeed, we submit that the mandatory subsidization of the speech of others, contrary to the desires of individual students violates their rights to free speech and free conscience.

The Regents and may of their *amici* rely heavily on *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995) for the proposition that once the university has created a forum, it cannot discriminate against political and ideological speech. That argument misses the point: the issue is whether the university or any governmental agency can create a forum for political and ideological advocacy and action by using other people's money.

In *Rosenberger*, students who published a Christian newspaper at the University of Virginia challenged the university's denial of their request for funding from the university's mandatory student activity fees. Although the university had used student fees to pay for printing costs for nonreligious newspapers, the university denied the plaintiffs' request because of the newspaper's religious content. *Id.* at 825-27. This Court held that the student activity fees created a "forum of money" and that, once established, the forum had to be made available on a viewpoint-neutral basis.

While *Rosenberger* did not consider the precise question presented in this case, the Court clearly provided guidance. It referred to the *Abood* and *Keller*[4] analysis:

> The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller v. State Bar of California,* 496 U.S. 1, 15-16, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235, 236, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

[4] *Abood v. Detroit Board of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of California,* 496 U.S. 1 (1990) .

Rosenberger, 515 U.S. at 840; Justice O'Connor, concurring, was more explicit: "Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. *See, e.g., Keller v. State Bar of California,* 496 U.S. 1, 15, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Abood v. Detroit Board of Education,* 431 U.S. 209, 236, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)." *Rosenberger*, 515 U.S. at 851.[5]

Not only did this Court in *Rosenberger* refer to *Abood* and *Keller*, but every circuit court which has considered the constitutionality of mandatory student activity fees has applied the *Abood* and *Keller* analysis, although the circuits differ on their implementation of the analysis. *See Galda v. Rutgers,* 772 F.2d 1060, 1063-64 (3d Cir. 1985); *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992); *Hays County Guardian v. Supple,* 969 F.2d 111, 123 (5th Cir. 1992); *Kania v. Fordham,* 702 F.2d 475, 479-80 (4th Cir. 1983). *See also,*

[5] The Regents and many of the *amici* supporting them rely, mistakenly, on *Rosenberger*. As the Court made abundantly clear, in that case it considered only the constitutionality of viewpoint discriminatory disbursement of student activity fees, not the constitutionality of forcing students to fund private political and ideological organizations. *Rosenberger,* 515 U.S. at 840.

Smith v. Regents of the University of California, 4 Cal.4th 843, 16 Cal.Rptr.2d 181, 844 P.2d 500, 511 (Cal. 1993).[6]

In *Abood*, 431 U.S. 209, this Court held that the Detroit Board of Education could compel non-union teachers to pay a fee in lieu of dues, explaining that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222 and so "long as [the union] act[s] to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223.

This Court then drew a clear distinction between using compulsory fees for collective bargaining and for political speech:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.

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[6] The Regents and their *amici* seek to avoid the *Abood-Keller* analysis, implicitly acknowledging that under that line of cases, the students must prevail. Alternatively, the argue that the "germaneness" test of *Abood* and *Keller* is satisfied because of the *ipse dixit* by the university that funding political and ideological advocacy and political action enhances the "educational environment." Such argument is fallacious because (1) it gives the university unlimited power to determine when it can infringe constitutional rights in the name of "education" and (2) germaneness cannot be construed so broadly to "*include political or ideological activities.*" *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 516 (1991) (emphasis supplied).

> Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36 (emphasis supplied)

In *Keller*, this Court began by explaining *Abood*:

> *Abood* held that unions could not expend a dissenting individual's dues for ideological activities not *germane* to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 13-14, 110 S.Ct. 2228.

Keller's holding ("The State Bar may therefore constitutionally fund activities *germane* to those goals....", 496 U.S. at 13) and *Abood*'s qualification (the Constitution requires that expenditures for ideological cause *not germane* be financed by voluntary funds, 431 U.S. at 235, 97 S.Ct. 1782), make "germaneness" a critical test. *Keller* set out guidelines for determining whether expenditures are

"germane" to the organization's legitimate functions and thus constitutionally permitted: "[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.' " *Id.* at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).

After *Abood* and *Keller*, this Court in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991) considered the constitutionality of various union expenditures under the germaneness analysis, suing a three-step analysis for determining whether union expenditures violated objecting employees' First Amendment rights. To be constitutional, the expenditure must be (i) "germane to collective bargaining; (ii) justified by the government's vital policy interest in labor peace and avoiding 'free-riders'; and (iii) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.[7] As *Lehnert* holds, the germaneness test involves more than whether the activity is germane to the governmental interest. It also requires that the university show that the exaction is vital to achieving the legitimate policy interests of the government and that it not unnecessarily burden the free speech rights of objectors. We shall refer to this test as the "*Abood-Keller-Lehnert*" analysis.

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[7] This Court recently reaffirmed this test in *Air Line Pilots Assoc. v. Miller*, ___ U.S. ___, 118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998).

We submit that the compelled funding of political and ideological speech and actions by private groups on and off campus does not satisfy the three prongs of the *Abood-Keller-Lehnert* analysis.

A. Funding Political and Ideological Advocacy Groups Is Not Germane to the Essential Function of the University.

"Germaneness" involves two questions: whether there is some legitimate governmental interest justifying compelled funding and whether the specifically challenged expenditure is germane to that interest. In this case, the Seventh Circuit held that the students did not contest the Regents' a legitimate interest in the compelled funding of the student government or student organizations in general. Thus the question in this case is whether the challenged activity is germane to the government's asserted interest.

The Regents assert an interest in "education." We do not, of course, dispute that the proper purpose of the university is education. The Regents then assert that funding private organizations which engage in political and ideological activities is germane to education because the funding allows more diverse expression, and this in turn is educational. However, we believe that "germaneness" cannot be read so broadly as to justify the compelled funding political and ideological advocacy, activities and speech by private organizations. In *Keller*, the California State Bar defended its funding of lobbying on nuclear weapons, abortion, and prayer in public schools by arguing that it was authorized to fund activities "in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." 496 U.S. at 15. This Court rejected such an broad definition of germaneness, holding that

expenditures to advance such policies as gun control or a nuclear weapons freeze clearly fell at "the extreme ends of the spectrum" of expenditures, were not germane to the organization's purpose, and therefore were unconstitutional. *Id.* at 15-16.

Lehnert involved a challenge to the union's use of dues to fund lobbying related to the teaching profession and state policy towards public employees generally (activities that we submit were closer to the core purpose of the union than the funding of political and ideological groups is to "education)." Nevertheless, the *Lehnert* Court held that "Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." 500 U.S. at 520 (plurality[8]). The Court concluded "that the State constitutionally may not compel its

[8] In *Lehnert*, five justices adopted the three-prong analysis described, but only four of the five agreed on the application of the factors. Four believed that the challenged lobbying was not germane to collective bargaining, while one thought that it was. The Court's holding is that lobbying was not germane to the union's legitimate purpose. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds' ....") (citation omitted). The four justices who did not join in the majority opinion also concluded that the lobbying activities could not be financed, but applied a "statutory duties test" instead of the three-prong analysis. 500 U.S. at 558 (Scalia, concurring in part, dissenting in part).

employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Id.* at 522 (plurality opinion). Thus this Court rejected a broad interpretation of "germaneness" and looked at the specific purposes of the union to determine the constitutionality of its use of the mandatory fee.

When presented with a similarly expansive assertion of interest in *Keller* --the advancement of the law-- this Court rejected such a broad construction of germaneness. *Keller,* 496 U.S. at 15-16.

In the *Abood-Keller-Lehnert* line of cases, this Court rejected arguments that political and ideological speech is germane to the governmental interest involved. In fact, in *Lehnert*, this Court stated that germaneness cannot be read so broadly in the context of a private sector union as to "*include political or ideological activities*." *Id.* at 516 (emphasis added).[9]

Germaneness cannot be so broadly read in the case of a university as to include forced funding by students of private political and ideological groups. Many of the groups are part of or affiliated with organizations which exist outside the university setting[10]. They are private groups which may be

[9] In *Ellis v. Brotherhood Railway Clerks*, 466 U.S. 435, 452 (1984) this Court held that even though the union activities in question may benefit collective bargaining, the benefits were too attenuated to be "germane" and therefore legitimately funded out of compulsory dues.

[10] For example, WISPIRG, the UW Greens, the International Socialist Organization, and Amnesty International all have non-university counterparts, and their policies reflect those adopted by

open to non-students and indeed controlled or guided by non-students. Unlike course materials or lectures on socialism, or the environment, or cultural diversity (positions many of these groups advocate), the groups that espouse those ideologies or policies are only incidentally concerned with education -- their primary goal is the implementation of their ideological beliefs or, even more blatantly, by direct participation in the political process (*e.g.* by lobbying legislators, propagandizing to the general public, rating candidates or supporting candidates for city-wide, state-wide or national office). The fact that some educational benefit may be derived from these activities is secondary, sometimes purely incidental, and sometimes only a "cover" for political action. They are not sufficiently germane to the core educational purpose of the university and the mere incantation of the shibboleth "education" cannot overcome a practice, repugnant to the First Amendment, of forcing objecting students to fund private political and ideological speech of such organizations.

The Regents argue that education is an expansive governmental interest, which they contrast with the "limited" interests of collective bargaining and oversight of the bar involved in *Abood* and *Keller*. They argue that because the interest is so broad, more activities, including political and ideological activities, are germane. The Regents correctly

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their off-campus affiliates. Various college and university PIRGs are parts of state-wide organizations, many with their administrative offices removed from any campus; the campus PIRG chapters send all (in the case of New York PIRG) or part of their student-fee revenue to the state headquarters. Most state PIRGs belong to U.S. PIRG, a national organization, and funnel some of their student-fee derived revenue to the national organization's office in Washington.

recognize the breadth of "education," but fail to see the circularity of their argument. It might be said that every experience in life is in a sense "educational," even if it merely teaches you that you do not want repeat the experience.[11]

The Regents also rely on *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.1992) ("*Carroll I*"), and *Carroll v. Blinken*, 42 F.3d 122 (2d Cir.1994) ("*Carroll II*"), wherein the Second Circuit applied the "germaneness" analysis of *Abood* and *Keller* and held that a state university could constitutionally fund the New York Public Interest Research Group with students' activity fees even though some students disagreed with that speech "as long as that organization spends the equivalent of the students' contribution on campus and thus serves the university's substantial interests in collecting the fee." 957 F.2d at 992[12]. In *Galda v. Rutgers*, 772 F.2d 1060 (3d

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[11] In a similar sense, getting being on campus or on the streets of nearby may be "educational," because the victim may learn what places to avoid or what times of day are unsafe, but one would hardly claim that the criminal activity is constitutionally protected, even if the perpetrator were a fellow student.

[12] *Carroll I* required that NYPIRG "spend[ ] the equivalent of the students' contribution on campus," 957 F.2d at 1002, while *Carroll II* required that NYPIRG spend the equivalent on (1) "activities that foster a 'marketplace of ideas' on the [State University of New York] campus; (2) activities that provide SUNY Albany students with hands-on educational experiences; and (3) extra-curricular activities for SUNY Albany students, both on and off the Albany campus, that fulfill SUNY educational objectives." 42 F.3d at 128. We believe that *Carroll II* was incorrectly decided, because it adopted a much too broad interpretation of the university's educational mission. This Court's guidance on interpreting "germaneness," stated in *Keller* and *Lehnert*, counsels against adopting the broad reading of "germaneness" which the Second Circuit took in *Carroll*. *Carroll* did not consider the

Cir.1985), the Third Circuit applied the *Abood* and *Keller* additional requirements stated in *Lehnert* -- that the activity supported be germane to a" vital" government interest and not unduly burden the rights of objectors. In a case involving the forced funding of political and ideological speech, those factors are of utmost significance.

In *Smith v. Regents of the University of California*, 844 P.2d 500, *cert. den.*, 510 U.S. 863 (1993), the California Supreme Court followed *Galda* and rejected *Carroll*. In *Smith*, students at the University of California at Berkeley challenged as violative of their First Amendment rights the school's mandatory activity fee which financed the student government and other student activity groups. The students objected to the use of their money to subsidize political or ideological activities of private organizations. The California Supreme Court held that:

> The principles that we derive from *Carroll* and *Galda*, as well as *Keller* and *Abood*, are these: A university may, in general, support student groups through mandatory contributions because that use of funds can be germane to the university's educational mission. At some point, however, the educational benefits that a group offers become incidental to the group's primary function of advancing its own political and ideological interests. To fund such a group may still provide some educational benefits, but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights. Phrased in terms of the tests that courts have applied, a regulation that permits the mandatory funding of such groups is not "narrowly drawn to avoid unnecessary intrusion on freedom of expression" and it "unnecessarily restrict[s] constitutionally protected liberty, [when] there is open a less drastic way of satisfying its legitimate interest."

Id. 844 P.2d at 511 (internal citations omitted).

"germaneness" analysis and concluded that while the New Jersey Public Interest Research Group offered some educational benefits to students, such benefits were "incidental" to the organization's primary political and ideological purpose, and this incidental educational benefit did not justify the infringement of the dissenting students' speech and association rights:

> Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the educational benefits are only "incidental"--arising from or accompanying the principal objectives--and subordinate to the groups' function of promoting its political and ideological aims.

Galda, 772 F.2d at 1065.[13]

Even if germaneness could be construed as broadly as the Second Circuit did, (but which the Third Circuit, the Seventh Circuit and the California Supreme Court in *Smith* did not), the Seventh Circuit's ruling should nevertheless be affirmed because, as we show below, the Regents cannot show that the compelled funding is by vital interests of the government, and does not add significantly to the burdening of free speech inherent in achieving those interests.

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[13] Atlantic Legal Foundation was counsel to the student plaintiffs in both *Galda* and *Carroll*. We believe that the Third Circuit's analysis, and its view that the Court must examine the centrality to education of the funded organization's activities, is correct.

B. Funding Political and Ideological Speech by Private Groups Does Not Serve Vital Interests of the Government.

The second leg of the *Abood-Keller-Lehnert* examines whether the compelled fee is justified by vital policy interests of the government. *Lehnert*, 500 U.S. at 520. For labor unions, those policy interests include both labor peace and avoiding "free riders" and for an "integrated bar" association "the state's interest in regulating the legal profession and improving the quality of legal services" justified the compelled association inherent in the integrated bar. *Keller*, 496 U.S. at 13-14.

We do not dispute that there is a vital government interest in education. For even a vital policy interest to survive scrutiny under *Lehnert*, however, it must justify *compelled* funding of the private activity. Neither the interest in education nor the interest in student participation in university governance[14] constitutes a vital interest in *compelling* students to fund private organizations which

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[14] We will concede also, *arguendo*, the government may have an interest in allowing students to share the governance of the university system , although we do not believe that the latter interest is "vital." It also creates serious risks that the majority in student government, who by definition are "activists" will abuse their power and impose burdens on students who are more interested in the classroom or the athletic field than campus politics. As was noted in Federalist No. 10, there is a greater danger of undemocratic factions arising in small polities. This risk is aggravated by the "hands off" policies of most school administrators, who would argue that the non-activist students are "learning a lesson in politics or government." The record in this case and other student fee cases shows that university administrators pay little attention to how the student fee money allocated to student government is actually spent and the activities of its recipients.

engage in political and ideological speech. In *Lehnert* non-union members challenged various union expenditures, including "lobbying activities related not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally. . . ." 520 U.S. at 521-522. In determining the constitutionality of the expenditures, a plurality of the *Lehnert* Court analyzed the vital policy interests involved -- labor peace and preventing free riders -- and concluded "[l]abor peace is not especially served by . . . charging objecting employees for lobbying, electoral and other political activities that do not relate to their collective-bargaining agreement." *Id.* at 521. Labor peace would not be enhanced "[B]ecause worker and union cannot be said to speak with one voice, it would not further cause harmonious industrial relations to compel objecting employees to finance union political activities as well as their own." *Id*. *Lehnert* stands for the proposition that there must be a "common cause" to justify compelled funding. In the union cases, where the union and nonunion members share a common cause -- collective bargaining on wages and working conditions -- a vital policy interest has justified compelled funding, but where there was no common interest -- for example on political campaigning and lobbying on issues not related to collective bargaining matters -- the exaction is not justified.

In this case, while there may be a common cause to promote education, and even if *arguendo* there is a common cause in "shared governance," there is no common cause

between the private organizations which engage in political and ideological speech and the objecting students.[15]

Far from further the shared interest in education, forcing objecting students to fund objectionable organizations undermines that interest. In courses on philosophy, political science, history, religion and humanities students are taught the values of individualism and the right and value of dissent. The Regents would have the law teach students that despite their dissent they must fund organizations promoting views that are abhorrent to them.

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[15] In this case, petitioners and many of the *amici* supporting them rely heavily on the "educational" mission of universities and the deference the courts "owe" to school administrators in determining whether a particular activity promotes that mission. Moreover, the administrators also as the courts to rely on the *ipse dixit* of the school administration. We submit that the "educational" function is often used as a pretext for ideological advocacy. Indeed, the catalog of goals the universities are said to promote indicates as much. For example, the Ninth Circuit in *Hollingsworth v. Lane Community College*, No. 97-35451, 1999 U.S. App. LEXIS 5391 at *2 (9th Cir. March 24, 1999), the court included in its list of virtues "instilling civic activism." *See also Carroll v. Blinken*, 957 F.2d 991, 992 (2d Cir. 1992)(describing "transmission of . . . civic duty" as a function of the school). We submit that the government has no proper role in promoting "civic activism," or that if it does, it should be funded, as is the federal election campaign fund, out of *voluntary* designations of a portion of the student fee.

C. *Use of a Mandatory Fee to Fund Political and Ideological Speech and Actions of Other Unnecessarily Burdens Free Speech.*

Even if the Regents could satisfy the first and second prongs, they cannot satisfy *Lehnert*'s third and final prong by proving that the forced funding does not "significantly add[ ] to the burdening of free speech inherent in achieving those interests." This branch of the analysis recognizes that any time the government forces individuals to fund private organizations, a burden on free speech and association may incidentally result, but that burden may be justified by an important governmental interest. Assuming there is a vital governmental interest in funding (which we have concluded there is not), the question then becomes whether a specific expenditure adds to the burden on speech inherent in the mandated funding of the organization in the first instance. If it does, funding those expenditures cannot constitutionally be required even if it is germane to an organization's mission.

The method for determining whether using compelled fees to fund a private organization which engages in political and ideological activities "significantly adds to the burdening of free speech," was also addressed in *Lehnert*. The Court held that funding political lobbying and using objecting employees' funds to gain public support "present[s] additional 'interference with the First Amendment interests of objecting employees.' " 500 U.S. at 521-522 (internal citation omitted). The Court explained:

> The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the

> public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." [*Wooley v.*] *Maynard*, 430 U.S. 705, 715, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

Id. at 522 (plurality opinion). The Court further explained that "Although First Amendment protection is in no way limited to controversial topics or emotionally charged issues, the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect." *Id.* at 521-22. (emphasis supplied)

In this case the burden on objecting students' speech "is particularly great"; the private organizations use the funds to "garner the support of the public in its endeavors," and as "an instrument for fostering public adherence to an ideological point of view" which the students find objectionable.

Some of the *amici* supporting the Regents (*e.g.* the AFL-CIO, the Brennan Center at NYU, The State of New York, *et al.*, and the United Council of University of Wisconsin Students, Inc.) rely on *Buckley v. Valeo*, 424 U.S. 1 (1976) stand for the proposition that the university can use the student activity fees to fund private organizations even if

those organizations engage in political and ideological activities and speech. In *Buckley*, Congress appropriated monies from income tax revenue to fund political organizations. The student activity fee, however, is not a tax. *Rosenberger* made this clear: "the $14 paid each semester by the students is not a general tax designed to raise revenue for the University." *Rosenberger*, 515 U.S. at 841. *See also*, 515 U.S. at 851-52, 115 S.Ct. 2510 (Justice O'Connor, concurring) ("The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.").

The Regents attempt to justify compelling the objecting students to fund these organizations because without funding less speech, and less controversial speech, will result. That may be true, but the Constitution does not mandate that citizens pay for the speech, let alone the "controversial speech" of others. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantage of that freedom.'").[16]

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[16] This Court's recent decision in *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 117 S.Ct. 2130 (1997), supports the distinction between political and ideological ("controversial") speech and innocuous speech. In *Glickman*, this Court in a 5-4 decision upheld the constitutionality of an assessment by the Department of Agriculture used in part to finance advertising of certain agricultural products. The Court relied on three characteristics of the regulation at issue to distinguish it from laws that the Court has found to abridge the First Amendment right to freedom of speech: (i) the

See also, Thomas Jefferson, Notes on the State of Virginia 233 (2d Amer.ed., 1794) ("[I]t is error alone which needs the support of government. Truth can stand for itself."). The Constitution guarantees that the people cannot be compelled to pay for such speech: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234-35 n. 31, 97 S.Ct. 1782 (quoting Irving Brant, *James Madison: The Nationalist* 354 (1948)).[17]

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marketing orders imposed no restraint on the freedom of any producer to communicate any message to any audience; (ii) the orders did not compel any person to engage in any actual or symbolic speech; and (iii) they did not compel the any producer to endorse or to finance any political or ideological views. The third factor was cited repeatedly by the majority. *See, e.g.*, 117 S.Ct. at 2140. ("in any event, the assessments are not used to fund ideological activities."). The majority recognized, however, that "[C]ompelled contributions for political purposes. . .implicated First Amendment interests because they interfere with the values lying at the 'heart of the First Amendment [--] the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.' "117 S.Ct. at 2139 (quoting *Abood*, 431 U.S. at 234-35). In *Glickman*, the four justices in the minority would have invalidated the orders because the First Amendment protects individuals against government compulsion to fund private speech *whether or not the speech at issue is political or ideological*. 117 S.Ct. at 2157 (Souter, dissenting). All nine justices in *Glickman* viewed the compelled funding of political and ideological views as unconstitutional.

[17] The compulsion Madison condemned is of even greater concern because in *Rosenberger*, this Court held that if the university funds any private political or ideological organizations it must fund them all, including Socialists, Nazis, the KKK, the Black Panthers, the Jewish Defense League, the Nation of Islam, the Christian Coalition, and various religious groups.

If the university truly seeks to create a "free marketplace of ideas," each idea will gain the support -- in adherents and financial resources -- it earns on its merits. Like any free market, the marketplace of ideas should neither depend on subsidies nor be inhibited by artificial restraints.

III. CONCLUSION

The mandatory student fee policy at the University of Wisconsin does not pass constitutional muster. Funding of private organizations which engage in political and ideological activities is not germane to a university's educational mission, there is no vital interest in compelled funding, and the burden on the students' First Amendment rights to freedom of belief outweighs any governmental interest asserted.

The ruling of the Court of Appeals should be affirmed.

Dated: August 13, 1999

Respectfully submitted,

Martin S. Kaufman
Counsel of Record
Edwin L. Lewis, III
Atlantic Legal Foundation
205 East 42nd Street - 9th Floor
New York, New York 10017
(212) 573-1960

Attorney for amicus curiae
Atlantic Legal Foundation

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No. 98-1189

IN THE

Supreme Court of the United States

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Petitioner,

—v.—

SOUTHWORTH, SCOTT, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, STUDENT RIGHTS LAW CENTER, INC., IN SUPPORT OF NEITHER PARTY URGING REVERSAL

MITCHEL D. GROTCH*

General Counsel & Executive Director
STUDENT RIGHTS LAW CENTER, INC.
18-05 215th Street
Bayside Terrace, New York 11360
(718) 225-3027

**Counsel of Record*

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I, Mitchel D. Grotch, a Member of the Bar of the Supreme Court of the United States, submit

1. I make this motion on behalf of *amicus* Student Rights Law Center, Inc. for leave of court to accept *amicus curiae* brief on consent out of time, served on the court and parties on June 25, 1999.

2. Written consent granted by petitioner and respondents was previously served upon the Clerk of the Court.

3. The Student Rights Law Center, Inc. (hereafter "SRLC") does not support the legal position of either party, but urges reversal.

4. This motion is made due to mitigating circumstances of the sudden illness of my brother, his untimely death, and the resulting delay in the final revision to comply with the rules of this Court.

5. The *amicus curiae* SRLC brings to the attention of the Court relevant matter not already brought by the respective parties which will be of considerable help to the Court.

6. I acknowledge and affirm that all parties that are required to be served with this proposed motion have been served.

7. A previous application has been made on June 25, 1999 by movant in this matter and was held in abeyance until conformance with the rules of the Court.

Wherefore, *amicus* SRLC respectfully requests the motion to accept the *amicus* brief on consent out of time be granted.

Dated: August 25, 1999

/s/ MITCHEL D. GROTCH
Mitchel D. Grotch
Counsel of Record
STUDENT RIGHTS LAW CENTER, INC.
18-05 215th Street
Bayside Terrace, New York 11360
(718) 225-3027

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IN THE

Supreme Court of the United States

No. 98-1189

BOARD OF REGENTS, UNIVERSITY OF WISCONSIN,

Petitioner,

—v.—

SOUTHWORTH, SCOTT, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, STUDENT RIGHTS LAW CENTER, INC.

INTERESTS OF *AMICUS CURIAE*

The Student Rights Law Center is a not-for-profit corporation of the State of New York dedicated in supporting the equal rights of college students and seeking the independence of self-governing student associations. SRLC's interest in the case at bar results from the prospect that federal court intervention will SRLC respectfully submits have counter-productive effects to peaceful self-governing associations on campuses throughout the country. Consent to file amicus curiae has been granted by the parties pursuant to Rule 37(3)(a).[1]

[1] Pursuant to Rule 37(6) the undersigned counsel authored and supported the printing of this brief.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari is granted limited to the following question: "Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in 'political' speech."

The Seventh Circuit opinion, *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998), if not reversed will have the unintended consequence of promoting dissenters within at-large dissenting organizations. By pitting students against each other in traditional public or limited-public forums of self-governing associations, this Court will inextricably cause dissension within student self-governing organizations, rather than other countervailing values promoted by the First Amendment. "Freedom *not* to associate"—a negative right—is unfounded in the text of the First Amendment to the Constitution. Respondents and the Seventh Circuit by conceding the compelled dues component of *Abood* line of mandated due cases avoids the delicate constitutional balance between religious freedom and political freedom of the First Amendment. See *Id.* 151 F.3d at 724 (II.A.1 (Germaneness)).

I. THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION, MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, UNAMBIGUOUSLY PROHIBITS CONGRESS, FROM ABRIDGING PURE SPEECH. THE FIRST AMENDMENT PER SE CAN NEVER BE OFFENDED. INDIVIDUALS ARE OFFENDED BY *PER SE* UNJUST (OR AS APPLIED) LAWS THAT ABRIDGE FREEDOM TO THINK, FREEDOM OF CONSCIENCE, FREEDOM TO WORSHIP, FREEDOM OF SPEECH AND EXPRESSION, FREEDOM OF PRESS, FREEDOM OF ASSOCIATION, FREEDOM OF ASSEMBLY, AND FREEDOM TO PETITION GOVERNING ASSOCIATIONS.

Pure speech is not conduct or action, but "political" speech. As a broad policy, government cannot abridge purely "political" speech. As envisioned by the Seventh Circuit "political" speech contains an element of political advocacy that somehow unconstitutionally negates the present student activity fee for the majority of student associations. This Court has on many occasions considered differently "political" speech protected from government infringement or ostracism where the government must show a legitimate compelling interest. *NAACP v. Button*, 371 U.S. 415 (1963), *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

The original plaintiffs (respondents herein) by invoking the First Amendment on the basis of individual relief seek to tilt the balance in favor of their dissenting political and moral beliefs. In essence their own religious beliefs, morals and world-view shape their "political" speech. Inasmuch as *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), found First Amendment viewpoint discrimination for not funding on-campus student religious newspapers, any issue of the opposite effect of religion or morality in limiting funding for purely "political"

speech is limited by this court even if worthy of briefing on this important point of contention. Cf. *Rosenberger* with denial of certiorari in *Carroll v. Blinken*, 957 F.2d 991 (2d. Cir. 1992) ("*Carroll I*"), *cert. denied*, 506 U.S. 906 (1992) and *Smith v. Regents of the University of California*, 844 P.2d 500 (Cal. 1993), *cert. denied*, 510 U.S. 863 (1993). See also, *Carroll v. Blinken*, 42 F.3d 122 (2d. Cir. 1994) ("*Carroll II*").[2]

This court denied petitions for certiorari[3] in *Smith v. Regents of the University of California*, 844 P.2d 500 (Cal. 1993). In *Smith*, the Calif. Sup. Ct in a similar case as here remanded to the lower state courts on the basis of the *Abood* line of cases, whether expenditures for paper upon which "political" resolutions were written of the Assoc. Students UC- Berkeley Government *per se* should be rebated to conservative dissenting students. Such determinations are doctrinally unsound for courts to determine: (1) what kind of speech is "political," and (2) develop rules for bureaucracies that have the effect of suppressing local political association. It is a delicate balance. Flat rules of law cannot be imposed like a cutout template superimposed upon unanalogous situations that overrides state legislation or programs. Respondents admittedly desire to make other beliefs for which they disagree go away from their view by de-funding them. It is nothing neither more nor less than conformity set to pattern the minority.

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[2] Subsequent to his graduation, plaintiff Carroll became a political aide to a Governor and a political organizer of "Change-NY" wielding power to appoint or defeat appointees or candidates, even education trustees on the basis of their viewpoints.

[3] *Amicus* counsel had occasion to present prior argument that the *Abood* line of cases is not applicable to student associations in a motion for rehearing in *Smith* representing the University of California Student Association.

A. First amendment cannot be offended by state law of shared goverance with popularly elected student-governing associations expending student allocable funds to separate and distinct organizations

Funding is made in accordance with state law, rules and regulations. *Southworth* 151 F.3d at 719-720. Wisconsin is unique of only a few states that provide student-governing associations the legal right of "shared governance." This is the core of our democratic values of self-governing associations. See, De Tocqueville, Democracy in America. Jefferson[4] spoke of the ideal of a free society among a hierarchy of self-governing units: "the elementary republics of the wards, the county republics, the state republics and the Republic of the Union, forming a gradation of authorities." The student governing association is one of those fundamental self-governing associations. Associated Students of Madison is not the petitioner. The Board of Regents is the petitioner before this court. The Regents' legal rights are separate and distinct and often at odds with the purely "political" speech of the Associated Students of Madison ("ASM" acronym as in Seventh Circuit opinion).

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[4] Jefferson also said: "The doctrines of Europe were that men in numerous associations cannot be restrained within the limits of order and justice, except by forces physical and moral wielded over them by authorities independent of their will...We (the founders of the new American democracy) believe that man was a rational animal, endowed by nature with rights and with an innate sense of justice, and that he could be restrained from wrong, and protected in right, by moderate powers, confided to persons of his own choice and held to their duties of dependence on his own will."

B. Student fee is neither authoritarian coercive instrument nor political or religious conformity test but merely practical collection of member dues

Percentage of political funds is neither large nor part of the political campaign process although it might contain elements of political advocacy protected by the First Amendment. Student governing associations in general are being squeezed by both ends-official state authorities from using funds for any interpreted political activities and those from the religious and political right. Argument that government should not subsidize speech is inapposite, for the Associated Students is a free association that happens to receive their own funds from the University of Wisconsin for collection purposes acting as trustee or agent in accordance with state law.

In any type of organization or association there must be some coercion to obtain collection of dues, otherwise the organization becomes inactive. That function was long ago determined to be the public university administration like their counterparts in private colleges and universities serving the same function. An anomaly will occur if public universities are treated differently, while private colleges continue not to be subject to the First Amendment. *Amicus* considers if the decision below is affirmed another anomaly exists for public university students not to receive the benefit of political speech under the First Amendment, while private college students receive the benefit even if not subject to the First Amendment. This is because the *Abood* doctrine is negative in character in positing a negative right for dissenters over and above the majority rule. The communications at stake are varied and multiple, but without material resources there are no Hyde Parks, no soapboxs, no stages, nothing to achieve results guaranteed under the Constitution. See, *Rosenberger*.

Respondents and the Seventh Circuit by conceding the *Abood* mandated dues compulsion component avoids the del-

icate constitutional balance between religious freedom and political freedom of the First Amendment. See *Southworth*, 151 F.3d at 724, II.A.1 (Germaneness). Respondents do not disagree with the idea of a student government *per se*, since ASM was never made a party. As the Seventh Circuit stated: "We need not answer the initial question [legitimate government interest in compelled funding] because the students do not contend that the Regents lack legitimate interest in the compelled funding of the student government or student organizations." *Id.*, at 724. This avoided the factual and legal issues at stake: the maintenance of peace and order on campuses since the 1970's by self-governance delegated to officially recognized student governments and lessened over-regulation by campus and state authorities. *But cf.*, *id.*, at 727-728.

The Seventh Circuit on the issue of germaneness found: "Moreover, unlike for example, a political science class on socialism, the International Socialist Organization is only incidentally concerned with education. Its primary goal is the promotion of its ideological beliefs." *Id.*, at 725. The court misses the point. Education encompasses self-respect, dignity, and self-governance. If germaneness is only limited to education for the Univ. of Wisconsin to conduct, then student self-governance and state law of "shared governance" is illusory. Forum of student governing association would encompass more values of self-government envisioned by Jefferson and Madison. The Court went further in limiting germaneness to stultifying lengths: "[t]he mere incantation of the rubric "education" cannot overcome a tactic, repugnant to the Constitution, of requiring objecting students to fund private political and ideological organizations." *Id.*, at 725. The point is distorted for political ideas are not private matters.

II. ABOOD LINE OF CASES HISTORICALLY MISPLACED AND IMPOSSIBLE TO APPLY WITHOUT BEING UNCONSTITUTIONALLY OVERBROAD

This Court in *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), found expenditures for political or ideological "activities" unrelated to collective bargaining agreement could not be compelled against the will of dissenting non-union shop members. Abood held that general allegations of complaint if proved establish a cause of action under the First and Fourteenth Amendment. There was no factual record before this Court in *Abood*.

The student government associations are unlike the unions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), *Machinists v. Street*, 367 U.S. 740 (1961), *Railway Clerks v. Allen*, 373 U.S. 113 (1963), *Abood v. Detroit Board Of Education*, 431 U.S. 209 (1977), *Teachers v. Hudson*, 475 U.S. 292 (1982), *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Communications Workers v. Beck*, 487 U.S. 735 (1988), *Lechnert v. Ferris Faculty Assn*, 500 U.S. 507 (1991), *Air Line Pilots v. Miller*, __ U.S. __, 118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998), the bar associations in *Lathrop v. Donohue*, 367 U.S. 820 (1961), *Keller v. State Bar Of California*, 496 U.S. 1 (1990) and *Phillips v. Washington Legal Foundation*, __ U.S. __, 118 S.Ct 1925, 141 L.Ed.2d 174 (1998). The constitutional attack is the State *per se* impermissibly funding third parties. It is a process of shared governance with the Associated Students. Even if assuming *arguendo* the State directly funds third parties or organizations, the political or ideological funding struck down since *Street* has been directed at the *private* union or the *private* bar association union or bar association funding its *own* activities not the petitioner State *per se*.

In *Abood* this court had a general reluctance in granting blanket injunctions in political speech cases. *Street* was more limited than *Hanson* in not relying on strict constitutionality.

The limited issue of "political speech" would suggest the remedial power of the court could conceivably strike down the entire state activity fee as it stands against a small amount of "political" speech though permitting distribution of funds for economic, moral, sexual speech; and on the basis certain religious speech upheld in *Rosenberger* on grounds of viewpoint discrimination. Thus, as framed respondents if successful would achieve an end run around the First Amendment of the Federal Constitution. Thomas Jefferson and James Madison led the fight against the renewal of Virginia's tax levy support of the established church. Madison wrote the *Memorial and Remonstrance*[5] against the churches of the Commonwealth of Virginia.

The two quotations often cited by this Court in the *Abood* line of cases by Jefferson and Madison envisioned a fight against the Establishment of Ecclesiastical Authority. Pure "political" speech has open-ended constitutional protection under the First Amendment, whereas religion can neither be established nor abridged. *Amicus* in reviewing the origin of the repeated cited two quotations by Jefferson[6] and Madi-

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[5] TO THE HONORABLE THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA. A MEMORIAL AND REMONSTRANCE

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled 'A Bill establishing a provision for teachers of the Christian Religion,' and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstruate against the said Bill. Reprinted in *Everson v. Board of Education*, 330 U.S., 63-74. (appendix to dissent of Justice Rutledge).

[6] Preamble to Jefferson's 'Virginia Bill for Religious Liberty' enacted by the Virginia Assembly: 'Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to

son[7] found they arose from this Court's opinions in *Everson v. Board of Education*, 330 US 1 (1947). As Hugo Black said in *Everson*, "the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions." *Id.*, at 12. The establishment clause prohibits religious monopoly.[8] Government does not have a monopoly of ideas and speech is a protected right. It was appropriate for a religious case like *Everson*, since the quotations dealt with propagation of *one official state religion* through the proposed taxation of all other religious denominations. The Establishment Clause ensures that neither the State nor the Federal Government "can pass laws which aid one religion, aid all

propagate it by coercions on either . . . ; *that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical*; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . .' Everson, Id., 12-13.(emphasis added). *Abood*, 431 U.S. 209, 234-235 n.31 (1977); *Teachers v. Hudson*, 475 U.S. 292, 305; *Keller*, 496 U.S. 1, 10 (1990); *Southworth*, 151 F.3d 717, 730 (1998).

[7] "Hostility to such compulsion was expressed early in our history. Madison, in his Memorial and Remonstrance Against Religious Assessments, wrote, "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" II Writings of James Madison (Hunt ed. 1901), p. 186. Jefferson in his 1779 Bill for Religious Liberty wrote "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." See 12 Hening's Va. Stat. 85; Brant, Madison, The Nationalist (1948), p. 354." *Machinists v. Street*, 367 U.S. 740, (Douglas dissenting *id.* at 778) (Black dissenting *id.* at 790 n.4); *Abood*, 431 U.S. 209, 235; *Teachers v. Hudson*, 475 U.S. 292, 305; *Keller*, 496 U.S. 1, 10 (1990); *Southworth*, 151 F.3d 717, 730 (1998).

[8] See generally, The Virginia Statute For Religious Freedom, Its Evolution and Consequences in American History, Ed. Peterson and Vaughan, Cambridge University Press, 1988.

religions, or prefer one religion over another." *Id.*, at 15. The clause requires that states be "neutral in * * * [their] relations with groups of religious believers and nonbelievers" *Id.*, at 18. Political speech knows no bounds of governmental neutrality. Rather government prohibits any infringement of speech. *Rosenberger*, *Everson*. Pure political speech has open-ended constitutional protection under the First Amendment, whereas religion cannot be established. Cf. Common Law Writ of Prohibition as a writ against the authority of a judicial officer. Both strike at authority, civil or ecclesiastical authority, for the protection of the individual to guarantee free will, conscience, thought, press.

This is a "political" speech case as limited by order of this Court, except to the extent the *Abood* doctrine is based on the antecedent establishment clause. The Board of Regents of the University of Wisconsin and the Wisconsin State Legislature are not making an official doctrine like the oath, pledge and salute of allegiance struck down by this Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Hundreds of college clubs receive funds voted by and amongst students and their elected and appointed leaders. Not one official party receives all funds—indeed there is a multiplicity of voices in the marketplace of ideas in a university setting. Any group if they so chose could obtain funding. Rather respondents seek to de-fund all others. From a strictly parochial or religious mind-set, all these groups could be lumped together and labeled immoral, political, socialist, communist, homosexual. *NAACP v. Button*, 371 U.S. 415 (1963), *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Then the respondents would be imposing their own official, moral, or religious church by the very First Amendment they received judicial relief. But cf., *Rosenberger*. It is the substantive relief that is overbroad not merely injunctive relief found by the Seventh Court.

It would be a giant frog-leap in existing jurisprudence under either *Abood* line of cases or *Rosenberger* for students, educators or attorneys to place the First Amendment rights of the majority of students into second place. "For majority has an interest in stating its views without being silenced by dissenters." *Machinists v. Street*, 367 U.S. 740, 773 (1961). Need arbitrators be hired to micro-manage student organizations and student governments, or even as the Seventh Circuit and respondents argue the right to micro-manage the State Board of Regents-an instrumentality of the State itself. It will only be at the expense of public college students in efforts to politically de-fund their "political" and "immoral" speech and to conform to a set religious orthodoxy.

Justices Frankfurter (joined by Harlan) dissenting in *Street* stated: "Is it respectful of the modes of thought of Madison and Jefferson projected into our day to attribute to them the view that the First Amendment must be construed to bar unions from concluding, by due procedural steps, that civil-rights legislation conduces to their interest, thereby prohibiting union funds to be expended to promote passage of such measures?" Id., 367 U.S. 740, 798.

The Seventh Circuit did not hold oral arguments on the constitutional issue of compelled funding. This core constitutional issue left unargued below leaves "political" speech for this court to decide. The result is to limit the constitutional issue and shoehorn the attack on germaneness with an emotional attack against ASM student self-governing association. The Seventh Circuit likens *Southworth* to the *Smith* analysis and concludes, "funding of political and ideological speech of private organizations is not germane to the university's mission." To do so would envelop the student government in a host of never-ending bureaucratic over-regulated litigation

that Justice Harlan warned of in *Railway Clerks v. Allen*, 373 U.S. 113, 131 (1963).[9]

III. ISSUE OF PROPER FORUM CANNOT NEGATE THE FIRST AMENDMENT RIGHT TO ASSOCIATE

Rosenberger decided the limited forum was not the self-governing Univ. of Virginia student governing association, but the monetary fund for which various student groups distributed funds to member organizations. Distribution of funding is not self-executory, but principally made by decisions voted by students and approved by the college administration.

Political advocacy is protected under campaign finance laws to those associations desiring to express any view whether moral, religious, economic, sexual or political in a political campaign subject to donation limits to ward off campaign corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). Here, germaneness standard has traditionally been assumed to be the province of educators and trustees granted wide range of discretion.

In mandated dues and campaign finance cases prohibition from making contributions is equated with compelled to make (mandated) contributions. The Court in *Abood* said: "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes

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[9] I do not understand how, consistently with *Street*, the Court can now hold that "it is enough that . . . [a union member] manifests his opposition to any political expenditures by the union" (*ante*, p. 118), or how it can say that in so holding "we are not inconsistent with" what the plurality was at such pains to point out in *Lathrop* (albeit in a constitutional context), *id.*, note 5. The truth of the matter is that the Court has departed from the strict substantive limitations of *Street* and has given them (and, as I see it, also that case's remedial limitations, *compare* 367 U.S., at 772-775, 778-779, 779-780, 796-797, with *ante*, p. 122-123 and Appendix) *an expansive thrust which can hardly fail to increase the volume of this sort of litigation in the future. Id.*, 373 U.S. at 131 (Justice Harlan, concurring and dissenting in part) (1963) (emphasis added).

works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." Id., 431 U.S. 209, 234-235 (1977). *Keller* in quoting from *Abood* wrote: "The Court noted that just as prohibitions on making contributions to organizations for political purposes implicate fundamental First Amendment concerns, see *Buckley v. Valeo*, 424 U.S. 1 (1976), "compelled . . . contributions for political purposes works no less an infringement of . . . constitutional rights." See, Keller, 496 U.S. 1, 9-10 (1990) quoting from *Abood*, 431 U.S at 234. The State is not abridging free will except a small fee to promote funding for student clubs. Tax-exempt status issue is a different issue, but one that has implications for the establishment clause of the First Amendment and the promotion of civil and equal rights. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) and *Allen v. Wright*, 468 U.S. 737 (1984). Unlike public unions, student clubs and organizations are not generally part of the political process or political campaigns. Student organizations use their own funds for pure expression compatible with the free speech clause of the First Amendment.

The Seventh Circuit states in a footnote: "[W]hat good does it do objecting students to work within the democratic process? Even if the objecting students run for, or obtain representation on the ASM, once there they cannot de-fund organizations whose viewpoint they opposed citing Rosenberger." *Southworth*, 151 F.3d at 732 n14. The argument Circuit Judge Manion in his opinion is not an *ad hominem* attack for its attack is against the majoritarian student self-governing association. An explanation lies in the logical extension of the *Abood* doctrine to absurd lengths in support of the minority against the very essence of our constitutional system and the legislative process, the give and take of compromise and majority rule. Respondents benefit by being outsiders, to

have their cake and eat it too. Respondents do not disagree with activities they agree with. It is everyone else's activities that they disagree with that brings them into court to de-fund —every other activity that *Wide Awake* won in *Rosenberger*. This case is reverse *Rosenberger*, if one were to analogize reverse discrimination. See, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

The Seventh Circuit opinion in large part does not use the *Rosenberger* analysis, but the *Abood* and *Keller* analysis, shoehorning mandated dues for students left open by this court in *Rosenberger*. Major distinction must be made between the expenditure of funds for political activities by unions in *Abood* and *Keller* and by students. It is not the University monies it is the students. Unions' expenditures were for their own activities. Respondents attack state expenditures to third party organizations. Expenditures are not made by university but students to other students.

A. State action or forum analysis impacts the freedom of self-governing associations

Point of analysis must start not with state action, but with the real actors—students. *Amicus* seeks to foster as Jefferson said their will unencumbered by authority, by free will, by persuasion and by example. It seems the courts have left the necessary party—the majority of students out of the equation —it is students who practice self-governance.The limited forum analysis was a shortcut in finding viewpoint discrimination in *Rosenberger*. This court's limitation on political speech in the *Abood* line of cases misses the point that respondents seek a moral religious conformity by going beyond what similar students won in *Rosenberger*—funding for a newspaper. Jefferson's exuberant confidence was based on faith in the quality of being human, the human quality of being innately different. When we erase inherently human

qualities for expediency and control we as a society become inhuman.[10] *But cf.*, Amendment X to the Constitution.

The *Abood* doctrine would be unworkable if applied in government. It is unheard of for corporate decision-making to be second-guessed even by owner-shareholders unless by a high threshold in accordance with shareholder derivative action statutes and the business judgment rule. In the case of *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), this Court made it clear that the principles of *Abood* apply equally to employees in the private sector. See, *Keller*, 496 U.S. 1, 10 (1990). *Communication Workers v. Beck*, 487 U.S. 735 (1988). If such a doctrine were applied entirely across the board, no self-governing association could ever be possible. Yet *Abood* is acceptable for *per se* dissenting organizations—unions, bar associations, IOLTA's, and now self-governing student associations. "Freedom not to associate" as a value inextricably functions to cause dissension among its association members. It is not a First Amendment value in the least. The *Abood* doctrine is more restrictive than necessary against the freedom of *per se* dissenting associations, since it is they who truly own their funds, which are just as fungible as monies in business organization. Government or self-governing associations would be at a standstill if individual dissenters obstructed the necessary and proper administration of programs[11].

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10 In concluding his book *Brave New World Revisited*, Aldous Huxley wrote:

> "Meanwhile there is still some freedom left in the world. Many young people, it is true, do not seem to value freedom. But some of us still believe that, without freedom, human beings cannot become fully human and that freedom is therefore supremely valuable. Perhaps the forces that now menace freedom are too strong to be resisted for very long. It is still our duty to do whatever we can to resist them."

Aldous Huxley, *Brave New World Revisited*, Harper & Brothers, 1958, New York, pg. 147.

11 "As James Madison noted, if a bill of rights were 'incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' 1 Annals of Cong. 439 (1789)." *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc., et al.* 454 U.S. 464, 494n.6 (1982).

CONCLUSION

The Seventh Circuit decision if upheld will strike a blow at the First Amendment rights of self-governing student associations unalterably leading to campus unrest as had occurred in the 1960's. For it was in that decade that students associated to fight unjust campus and state rules imposed without "shared governance." It was in the 1970's that mandatory student activity fees were established on campus to give students control over their lives and give them some forum in which to realize material goals and results. The promise of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Bolling v. Sharpe*, 347 U.S. 497 (1954), was a commitment not just to end a dual racially-segregated school system, but a new vision by this Court full of exuberant confidence in the future generations—of our youth—posterity—true societal "free-riders."

There are major doctrinal difficulties with imposing such blanket solutions nationwide on state college campuses and state college students for it is doctrinally, historically, legally, and practically unworkable. Take away student self-government authority, superimpose campus officialdom, or other moral or parochial hierarchy, and all speech will be abridged. We can teach our youth freedom to explore their own potentials with newer technologies or we can fear them by bestowing strict authority and control—official or moral. The only thing that stands in the way in chilling speech is the delicate balance to *our* Constitution.

The volume of litigation spourned by affirming the opinion below will be at the cost of the freedom of association for a majority of student organizations.

Amicus urges reversal of the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

MITCHEL D. GROTCH*

General Counsel & Executive Director
STUDENT RIGHTS LAW CENTER, INC.
18-05 215th Street
Bayside Terrace, New York 11360
(718) 225-3027

**Counsel of Record*

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